United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1197

To be argued by
FRANK H. WOHL

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1197

UNITED STATES OF AMERICA,
Appellee,

—v.—

NORMAN RUBINSON, WILLIAM CHESTER, EDGAR REYNOLDS and LAWRENCE LEVINE,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Norman Rubinson, William Chester and Edgar Reynolds appeal from judgments of conviction entered on May 15, 1975, and Lawrence Levine appeals from a judgment of conviction entered on May 29, 1975, in the United States District Court for the Southern District of New York after an eight-week trial before the Honorable Constance Baker Motley, United States District Judge, and a jury.

Indictment 74 Cr. 573 filed on June 4, 1974, charged ten defendants, including all of the appellants, with conspiracy to transport and sell unregistered securities, and to commit securities fraud, mail fraud and wire fraud in connection with the purchase and sale of the common

stock of Stern-Haskell, Inc. in violation of Title 18, United States Code, Section 371 (Count One). The indictment also charged defendants Rubinson, Chester and Levine and others with five counts of securities fraud in violation of Title 15, United States Code, Sections 77q and 77x (Counts Two through Six); two counts of securities fraud in violation of Title 15, United States Code, Sections 78j, 78ff and Rule 10b-5 of the Securities and Exchange Commission (Counts Seven and Eight); and five counts of mail fraud in violation of Title 18, United States Code, Section 1341 (Counts Nine through Thirteen). The indictment also charged Rubinson, Chester and Reynolds, along with others, with interstate transportation of unregistered securities in violation of Title 15, United States Code, Section 77e (Count Fourteen) and four counts of use of the mails to sell unregistered securities in violation of Title 15, United States Code, Section 77e (Counts Fifteen through Eighteen). Finally, the indictment charged Rubinson and Chester, along with one other defendant, with two counts of wire fraud in violation of Title 18, United States Code, Section 1343 (Counts Nineteen and Twenty). The indictment charged that all the above violations occurred in connection with transactions in the stock of Stern-Haskell, Inc.

Trial commenced on January 22, 1975. On March 23, 1975 the jury returned verdicts finding Rubinson and Levine guilty of conspiracy (Count One); Rubinson, Chester and Reynolds guilty of interstate transportation of unregistered stock (Count Fourteen); and Rubinson, Chester, Reynolds and Levine not guilty on the other counts for which they were charged.*

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* The jury also convicted defendant Albert Feiffer on Counts One, Three and Fourteen, but Feiffer has not appealed. The jury acquitted defendants Jerome Haskell, Walter Wax, and Michael Gardner. Judge Motley dismissed Count Twenty against defendants Rubinson and Chester at the close of the Government's case. (Tr. 7422-34).

On May 15, 1975, Judge Motley sentenced Rubinson to concurrent terms of three years' imprisonment on Counts One and Fourteen and Chester and Reynolds to a term of three years' imprisonment, execution of which was suspended, with a term of three years' probation. On May 29, 1975, Judge Motley sentenced Levine to a fine of $10,000. Execution of all sentences was stayed pending this appeal.

Statement of Facts

A. The Government's Case

1. Stern-Haskell, Inc.

In late 1968 Stern-Haskell, Inc. was a wholesale used car company operating out of a large garage on Jerome Avenue in the Bronx, New York. (Tr. 2024, 2223).* Unindicted co-conspirator Richard Stern was the company's President and acquitted defendant Jerome Haskell was the Secretary-Treasurer. When the company was formed in 1965, Stern and Haskell each owned 100 of the company's total of 200 shares of stock.** (Tr. 2028). Between 1965 and 1968, Stern-Haskell maintained an average of seven or eight salaried employees and approximately eight commissioned buyers. (Tr. 2029-30).

During 1967 and 1968, Stern and Haskell had considered making Stern-Haskell a public company, but rejected the idea because the company could not afford the cost, approximately $50,000, of issuing a prospectus, which they understood would be necessary in order to make a public offering of Stern-Haskell stock. (Tr. 2035-38).

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* Citations preceded by "Tr." are to the trial transcript. Citations followed by "a," are to the Joint Appendix of defendants Rubinson and Levine and the Government. "GX" stands for Government Exhibit.

** A certified audit report issued in October 1969, after the events here in issue, revealed that the stockholders' equity was a deficit. (GX 106B).

During late 1968, Haskell began discussions of a possible public offering of Stern-Haskell stock with defendants Sidney Stein,* Norman Rubinson, Albert Feiffer and William Chester. (725a-32a; Tr. 2039-48). Stein, Rubinson and Feiffer were investors and financial consultants who resided in Florida and commuted to New York each week where they conducted their investing activities out of Stein's apartment on East 72nd Street in Manhattan. (387a-90a, 394a-96a).** Chester was a Florida attorney residing in Miami. At discussions which took place in both New York and Florida, Stein, Rubinson, Feiffer and Chester told Haskell about an arrangement by which Stern-Haskell could become a public company without issuing a prospectus. This arrangement, called a "spin-off," would cost considerably less than the ordinary method of going public. (Tr. 2041-45). Haskell reported back to Stern that this procedure could be accomplished through National Ventures, a Florida real estate holding and development company. (Tr. 2039-40).

2. National Ventures, Inc.

At the end of 1968, National Ventures was a Florida shell corporation of which defendant William Chester was the organizer, president and chief stockholder. (GX 13A, 13B, 50). The corporation engaged in no business, had no offices other than Chester's home and law office, and had virtually no assets. (Tr. 577-80). Chester listed on the corporation's books as its major asset a tract of Peruvian land, even though Chester had transferred the land to the company (in return for 375,000 shares of

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* By 1968 Stein had been indicted two or three times for securities violations. (Tr. 3837). He had first been indicted in 1965. (Tr. 4009).

** In New York, Stein, Feiffer and Rubinson shared use of a chauffeured limousine bearing license plate letters "SFR," which comprised the first letter of each of their last names. (390a-93a).

National Ventures stock) without ever obtaining clear title to it.*

National Ventures had been created in 1968 as the successor corporation of Toy King, Inc. a defunct toy and game company. (GX 50; Tr. 3126). Control of Toy King, Inc. had been acquired by Chester after he had told his close friend, defendant Edgar Reynolds, that he, Chester, would like to obtain a shell company. Reynolds obtained control of Toy King (240a; Tr. 753-54) ** and turned it over to Chester in return for an agreement that he would receive a portion of the shares of whatever successor corporation Chester created. (Tr. 572). Chester installed himself as President of Toy King, Reynolds as

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* On National Ventures' balance sheet of December 31, 1968, Chester listed assets of $3016.48 in cash, $289.90 in stocks and $3450.00 in land. (GX 4C). Earlier in 1968 Phillips Moore agreed to sell Chester 34,500 acres of land in Peru for $8000 which Chester was to pay Moore, when Moore produced clear title to the land, by delivering to him 1000 shares of Allen Electronics stock which was then selling for between $7 and $8 per share. (Tr. 223). At the signing of the agreement (GX 2), Chester paid Moore $500 for the cost of obtaining a clear title to the land. Moore never obtained clear title, because the land was confiscated by the Peruvian government. (Tr. 229). Moore so informed Chester in January 1970. (Tr. 230). Chester never paid for the land. (Tr. 230-31). Moore did, however, receive through the mail 1000 shares of National Ventures and subsequently shares of Stern-Haskell, Mobile Homes Ventures and Diston Industries, although he had never purchased or ordered any of them. (Tr. 231-38). Chester never told Moore why he was receiving these shares (Tr. 260), although Chester did give National Ventures stock away to many people because he wanted to increase the number of the company's shareholders. See *infra*, p. 6.

** Toy King was incorporated in Florida in 1959 as a subsidiary of Kel's 5-10-25¢ Stores, Inc. Kels underwent an intrastate securities registration in Florida in 1959 and in 1960 distributed its Toy King shares to its stockholders. In January 1962, Toy King increased its total outstanding shares from 448,165 shares to 500,000 shares. (GX 50; Tr. 3119-22).

Vice President and his "law clerk," Sten Nordin, as secretary. He then changed the company's name to National Ventures. Chester also recapitalized the company by increasing the authorized shares, consolidating the existing shares and issuing a substantial majority of the company's stock to himself in exchange for the Peruvian land.* The end result of these activities was that Chester owned 300,000 shares of National Ventures' 400,000 outstanding shares (GX 50); no shares were in Reynolds' name although over 24,000 shares were put into the name of Marinus Laboratories, a small company in which Reynolds was a major influence (Tr. 571); and Reynolds' parents owned several hundred shares of National Ventures stock. (GX 24, 25, 26, 670).

Chester then expanded the number of National Ventures shareholders from approximately 100 to over 800 (GX 24, 25, 26; Tr. 3454) by giving away ten-share stock certificates to many of his friends and acquaintances (Tr. 5286-87) and by having Nordin register stock in the names of his girlfriends and relatives. (Tr. 637-39).** Chester asked unindicted co-conspirator Louis Larry Ho-

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* Chester wrote a letter dated October 18, 1968 to Toy King stockholders announcing the resignation of the former officers and the installation of himself, Reynolds and Nordin as the new officers. (GX 13B, 131). With this letter Chester enclosed a notice to Toy King stockholders (GX 13A), on which he forged Nordin's signature (Tr. 5986), announcing a stockholder's meeting at his home to vote on the change of the company's name to National Ventures, an increase in the authorized common stock of the company to 5,000,000 shares at one cent par value, and a reverse split of the company's original 500,000 shares of stock, one new share for five old shares. (GX 13A, 130, 50). By notice dated November 2, 1968, the stockholders were notified that these measures had been approved. (GX 13C, 14, 50, 132; Tr. 3114-15).

** Chester had been told by an attorney in Washington that it was necessary to have a certain number of shareholders to satisfy legal requirements. (Tr. 621-25, 1065-70).

chen to buy National Ventures stock and register it in several names. (Tr. 2563).

Chester and Rubinson also established Stock Transfer Agency (Tr. 269-73, 2551-55), a sole proprietorship in the name of Nordin, Chester's "law clerk" and messenger, who became the manager of the stock transfer business. Chester paid Nordin a salary of between fifty and seventy-five dollars per week. (Tr. 264, 273). Stock Transfer Agency acted as transfer agent only for several companies in which Rubinson had an interest and for National Ventures and its progeny, Stern-Haskell and Diston Industries.*

3. The Stern-Haskell Public Offering

On February 8, 1969, Rubinson, Stein, Feiffer, Chester and Haskell and unindicted co-conspirators Saul Weitzman and Louis Larry Hochen, along with several other people, met at the offices of Weitzman's company, Blank Furniture, in Miami. (Tr. 2578). There it was agreed that a public offering of Stern-Haskell stock would be accomplished by transferring 200,000 ** Stern-Haskell shares to National Ventures which would then distribute those shares to its stockholders as a liquidating dividend. (401a-02a, 405a-06a). Weitzman, Hochen, Feiffer and Harry Silber were designated as nominees *** of Stein,

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* Stock Transfer Agency commenced operations on the premises of Rubinson's company, Allen Appliances, where Chester was also employed as general counsel. (Tr. 271-73, 286). Later it moved to its own office on Biscayne Boulevard near the house Chester used as his home and office. (Tr. 285). Eventually, after Nordin proved unable to operate the business, Chester moved Stock Transfer Agency into his home. (Tr. 286-87).

** Stern-Haskell was recapitalized, increasing its authorized and outstanding shares to 1,000,000 shares. (GX 108).

*** Weitzman testified to this explicit arrangement. Hochen testified that he did not then agree to be a nominee, although

[Footnote continued on following page]

Rubinson and Feiffer * for the purpose of holding shares of National Ventures and subsequently shares of Stern-Haskell. (402a-03a). It was also agreed that in return for allowing their names to be used, each nominee would receive 2,000 shares of Stern-Haskell stock. (403a). Stein, Feiffer and Rubinson agreed to advance the money needed by Weitzman to purchase 37,500 shares of National Ventures. (407a).

Stein also announced that he would arrange the public market of Stern-Haskell so that it would increase in value to approximately $5 per share. (2580a-81a).

During February 1969, Rubinson took Stern and Haskell to the law offices of Attorney Irwin Germaise ** to obtain an opinion regarding the legality of the proposed transaction. (Tr. 2072-80). At about the same time, Chester transmitted to Germaise a certificate purportedly signed by Nordin, but actually forged by Chester (Tr. 5984-85; GX 108), that National Ventures had 654 active and 140 inactive stockholders (but failing to mention that most of the stockholders had achieved this status only because they had received gifts of small numbers of

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he wound up in that status when Rubinson insisted that Hochen forfeit his Stern-Haskell shares for $187.50 because Rubinson said he needed the shares in order to give them to brokers in return for making a market in Stern-Haskell stock. (Tr. 2579-80, 2598). Hochen also recalled that at the meeting it was stated that McKay, Chester's close friend, was to be a nominee. (Tr. 2580).

* Weitzman testified to this precise arrangement. (402a-03a). Stein testified that originally Weitzman, Hochen, Feiffer and Silber were to act as nominees for Stein and Rubinson, but that later Feiffer was permitted to join Stein and Rubinson as an equal partner in the deal. (733a, 735a-37a).

** On another occasion Rubinson had told Weitzman that Germaise was a good attorney, because he would "go out on a limb" to render helpful opinions for Rubinson's benefit. (464a-66a).

shares from Chester), as well as a letter stating that National Ventures "owns 34,500 acres of unimproved land in Peru" (but failing to state that the transferror to the corporation of that land was Chester who had no clear title to the land at the time of the transfer) and also stating that National Ventures "has investments in stocks of other public (sic) traded corporations." (GX 108).

Germaise responded by writing to Chester, and delivering to Stern, Haskell and Rubinson, a fifteen-page opinion letter (GX 108), noting that the law concerning the registration requirements applicable to stocks reaching the public by spin-offs was unclear but that such transactions were lawful only if they were executed in good faith and not merely as subterfuges to evade the registration requirements. The opinion letter concluded:

> "*Conclusion*: It is the opinion of the Undersigned, that the transaction whereby National [Ventures] purchases shares of Stern [-Haskell] is exempt pursuant to Section 4(2) of the Act; the distribution of the Stern [-Haskell] shares as a dividend to National [Ventures] shareholders is an exempt transaction in accordance with the Commission view thereon and the "no sale" theory; the Stern [-Haskell] shares in the hands of the "non-control" National [Ventures] shareholders are "free trading" *in the absence of a plan or scheme to utilize such shareholders as a conduit for distribution in evasion of the Registration requirements of the Act. . . .*" (GX 108, at 14) (emphasis supplied).

Elsewhere in the opinion Germaise warned:

> "In view of the foregoing and of the expressed opinion of the Commission, the entire transaction,

> including all of the intermediate steps may not be a pre-existing plan or device to avoid registration and to, absent such protective device, distribute large blocks of stock to the general public." (GX 108 at 11)

In March 1969, Chester and Stern executed an agreement between National Ventures and Stern-Haskell codifying the proposed spin off. The agreement (GX 106)* provided that National Ventures would buy 200,000 shares of Stern-Haskell stock for $5,000, at two and one-half cents per share, and that National Ventures would distribute the Stern-Haskell shares to its stockholders. On or about March 7, 1969, Chester sent a $5,000 check drawn on National Ventures (GX 109, 109A) to Stern-Haskell, ostensibly as payment for the 200,000 shares of Stern-Haskell stock. At about the same time, however, Chester demanded a $5,000 "attorneys' fee" from Stern-Haskell. (Tr. 2097-98). The "fee" was paid by Stern-Haskell's check to Chester dated March 13, 1969. (GX 110). National Ventures' check to Stern-Haskell then bounced, and Chester deposited the "attorney's fee" check into his personal account and transferred $3,500 into National Ventures account, so that, when Stern-Haskell re-deposited the National Ventures' check, it cleared against the funds Stern-Haskell had paid Chester. (Tr. 3143-46).

On or about March 7, 1969, the day that Chester wrote the check to Stern-Haskell, Chester also mailed to all National Ventures' shareholders announcements of a liquidating dividend of 100% of the 200,000 shares of Stern-Haskell stock owned by National Ventures. (GX 4A). On or about April 11, 1969, Chester arranged for

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* Part of the agreement was that each company would obtain an opinion of counsel that the proposed offering did not violate the securities laws. (GX 106).

the distribution of the Stern-Haskell shares to the National Ventures shareholders. (GX 5A).

By this time the defendants and their nominees were the major National Ventures stockholders of record. Chester owned 116,000 shares. Each of the nominees owned slightly less than ten percent of National Ventures' outstanding shares. Feiffer owned 39,000 shares, Weitzman, Hochen, Silber and McKay each owned 37,500 shares (GX 50) and Marinus Laboratories owned 24,642 shares. (GX 23).* Smaller amounts were held by Frances Roberts, Chester's ex-wife, Reynolds' parents and Charles Cairnes, Reynolds' business associate. (GX 24, 25, 26, 27, 670).

Accordingly, National Ventures' distribution of Stern-Haskell shares (one Stern-Haskell share for every two National Ventures shares) resulted in transfers primarily to the defendants and their nominees or associates. Chester instructed Nordin to transfer Weitzman's, Hochen's, Silber's and Feiffer's shares into the name of Lockwood & Company, telling him that Lockwood was in Rubinson's "back pocket." (263a). Chester also told Nordin to issue those shares in 100-share certificates because they were easier than large certificates to market. (258a).**

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* There were a total of 400,000 shares outstanding. The original Toy King shareholders' holdings had been reduced from 500,000 shares to 100,000 shares by Chester's reverse one-for-five split. (GX 50). Chester had obtained 345,000 shares for the Peruvian land. (GX 13C). He then sold 45,000 of his shares back to National Ventures (GX 50) and transferred 37,500 shares each to Weitzman, Hochen, Silber, and McKay and 34,000 to Feiffer (to add to the prior holdings of 5,000 shares in Feiffer's name which Feiffer had acquired from Marinus Laboratories in January, 1969 (GX 23)) leaving Chester with 116,000 shares.

** Chester and Rubinson also directed Nordin to prepare 350,000 additional shares of Stern-Haskell stock, in 1000-share

[Footnote continued on following page]

Meanwhile, in New York, Stein, Rubinson and Feiffer arranged for the distribution of the Stern-Haskell shares to the public. After a brief and unsatisfactory effort to market the shares through Michael Gardner, Stein took the Stern-Haskell deal to defendant Lawrence Levine (738a-42a), the head trader* at Lockwood Company. (Tr. 4712, 4714).** Stein and Levine agreed that Lockwood would make a market in Stern-Haskell stock, buying the stock from Stein, Rubinson and Feiffer (who had all the nominee stock, in Lockwood's name, in their possession)

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certificates, also in the name of Lockwood & Company, which were never entered in the stock transfer records of Stern-Haskell, maintained by Stock Transfer Agency. (274a-82a; GX 24, 25, 26). Rubinson then either brought those additional shares to New York or directed Nordin to do so. The proof was in conflict on this point: Nordin testified that Rubinson directed him in a telephone conversation to prepare these certificates and to bring them to Rubinson in New York. Nordin testified that he followed these instructions, delivering the certificates to Rubinson at the office of Lockwood. (282a-83a). Stein testified that the stock which Nordin brought to New York was a different block of 50,000 shares. (816a-18a). Weitzman testified that Rubinson told him that he brought a large package of Stern-Haskell stock certificates to New York, but he did not say whether they were the shares derived from the nominees' shares or the 350,000-share block. (414a). Stein explained that he understood that these 350,000 shares were restricted investment stock to be used for potential mergers and acquisitions. (Tr. 2126-33). Nordin, however, testified that Chester instructed him not to stamp the certificates with a restrictive legend. (276a). Stein testified that he, Rubinson and Feiffer discussed selling some of the stock to Benno Szpiro, a Swiss investor. (811a-12a). Although a letter was written describing that transaction (GX 181-84), the sale never occurred.

* Levine told Stein that he was the owner of Lockwood. 745a). Rubinson and Feiffer also told Weitzman that Levine was the owner of Lockwood. (411a-12a).

** At that time Stein and Feiffer were frequent visitors to Levine's offices at Lockwood. (Tr. 4724). Several other brokerage firms had instructions to reach Stein and Feiffer at Lockwood if they were not at Stein's apartment. (Tr. 4575, 5686-87).

and selling it to investors through other brokerage firms. They also agreed that Levine would receive cash payments from Stein, Rubinson and Feiffer based on the number of shares Lockwood bought from Stein, Rubinson and Feiffer. The payments were to be approximately one dollar per share, assuming the stock was selling at about four. If the stock was selling markedly above or below that price, the payments were to be adjusted accordingly. Stein also assured Levine that he and his associates controlled "the box" of Stern-Haskell stock so that no uninvited sales of the stock would interfere with their control of the market. It was also agreed that Stein, Rubinson and Feiffer, as well as Levine, would be responsible for stimulating buying of Stern-Haskell stock and that the stock would be sold to Lockwood through New York Stock Exchange member firms rather than directly from Stein, Rubinson and Feiffer. (749a-54a). Stein, Rubinson and Feiffer further agreed to break the block up into several smaller blocks to avoid having one of the brokers ask whether the stock amounted to a control block. (782a-84a).

Pursuant to this arrangement, Feiffer, in May 1969, opened accounts at three New York Stock Exchange firms: Granger & Company, Shaskan & Company and Tessel Paturick & Ostreau, Inc. ("TPO"). During the months of May and June 1969, shares of Stern-Haskell stock were sold * to Lockwood ** through the three Feiffer

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* Naturally these sales required that the Stern-Haskell certificates be endorsed by Ben Malmeth the ostensible owner of Lockwood. Feiffer and Rubinson accomplished this by promising money and cheap stock to Malmeth. (759a-60a). On one occasion during late April or early May 1969 Weitzman and Feiffer went from the 72nd Street apartment to Levine's office where Feiffer had a conversation with Levine and then divided up the Stern-Haskell certificates into separate piles, and took them out of Lockwood's office (421a-24a). Lockwood appeared in the pink sheets as a trader in Stern-Haskell on 91% of the days Stern-Haskell appeared. (GX 671; Tr. 5750), and traded 90% of the shares traded in the public market. (GX 670; Tr. 5758).

** Levine traded Stern-Haskell for Lockwood. (Tr. 4715, 4718, 4531).

accounts at prices ranging between 3 3/4 and 4 3/8. The price of Stern-Haskell rose from its initial quotation of one dollar per share in mid-April 1969 to 4 3/8 in June 1969.* (GX 670). Levine simultaneously sold the shares purchased from Feiffer's accounts through several retail brokerage firms who were buying on behalf of members of the investing public. (GX 670). These sales were the result of frequent telephone calls to Stein's apartment from Levine in which Levine would inform Stein, Rubinson or Feiffer that he had buy orders from retail brokers for Stern-Haskell. Stein, Rubinson or Feiffer would then issue a sell order to one or more of Feiffer's three accounts. (761a-66a). Levine would then buy the shares from the Feiffer account ** and receive his cash payoff a few days later. (767a-68a).

In order to stimulate investor interest in Stern-Haskell stock, Levine hired defendant Phillip Kaye to tout the stock. Levine agreed to pay Kaye a fee based on the number of shares Kaye caused to be purchased. (1133a-34a).

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* When the price was 2 or 2½, Stein, Rubinson or Feiffer told Weitzman that it would go up further. (434a). During May and June 1969 Weitzman also heard Stein talking on the telephone to Levine and others giving instructions about what to do with respect to transactions in Stern-Haskell stock and how Levine should list the stock in the National Quotation Bureau pink sheets the following day. (425a-26a). When Stein and Levine discussed Stern-Haskell in person, however, Weitzman was asked to leave. (427a).

** Feiffer made one sale of 400 shares to Lockwood directly on May 15, 1969. (GX 670). The other Stern-Haskell shares were sold from the three Feiffer accounts in forty-seven orders of between 400 and 4000 shares each. Lockwood bought all but two of those orders. (Tr. 5759). The sell orders issued to the Feiffer accounts were "limit" orders, stating the price at which the stock was to be sold, and naturally resulted in sales to Lockwood because it was "reaching" for the stock, *i.e.*, offering to pay more for Stern-Haskell than its competitors. (Tr. 4534; GX 670).

On one occasion, Levine sent Kaye to Stein's apartment to pick up several thousand dollars in cash due Levine for his Stern-Haskell transactions. Kaye went with Stein to his vault where Stein obtained a quantity of cash which he gave to Rubinson. Rubinson then counted the money and gave it to Kaye. (767a-68a, 1136a-37a). Kaye delivered the money to Levine at Lockwood where Levine paid Kaye his share, between $1500 and $2,000. (1138a).*

At one point during the distribution, Levine complained to Stein that too much Stern-Haskell stock was being sold by unknown sellers and that, if this continued, Levine would not be able to continue to control the price. (791a-97a). Stein and Rubinson then confronted Chester who admitted making the sales ** and said he needed to sell more stock. (797a-99a).

Chester and Reynolds then came to New York in early June 1969 where Stein and Rubinson arranged for them to sell 18,500 shares of Stern-Haskell stock in Reynolds' name ** at $1.50 per share—the market price was then

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* Stein and Feiffer paid Levine cash due on Stern-Haskell transactions on several other occasions during the summer of 1969. (773a-75a). Levine paid Kaye on at least one other occasion. (1138a-39a).

** Chester's ex-wife, Frances Roberts, sold 1200 shares during May 1969 through Prudential Investment Corporation, a brokerage firm in Miami (GX 670); Nordin delivered the proceeds of her Stern-Haskell sales to Chester, usually in cash but on one occasion in the form of a check from Prudential Investment Corporation to Frances Roberts in the amount of $2710.26 endorsed by Roberts and then Chester. (GX 158; Tr. 731-33). Nordin and Chester also sold shares under the false name Jerry Becker, using the proceeds for Stock Transfer Agency expenses including checks to Chester as legal fees. (Tr. 750-53). Chester had also instructed Nordin to use another false name "M. Anderson" on an earlier occasion. (Tr. 280).

** This stock had been issued to Andrew McKay as a result of his ownership of 37,500 shares of National Ventures and then transferred into Reynolds' name. (GX 27).

between 3 7/8 and 4 3/8—to B'Noth Jerusalem, a charitable organization which Stein had previously used as a nominee. (Tr. 3597-04). Chester and Reynolds took the stock to B'Noth Jerusalem's office in Brooklyn on June 6, 1969 to make the sale, and B'Noth Jerusalem issued a check in the amount of $28,125 to Reynolds who endorsed it and returned it to B'Noth Jerusalem, receiving payment by another instrument or cash. (Tr. 4871-73, 5996; GX 215, 215A). The following Monday, June 9, 1969, Chester deposited $10,000 in his bank account, noting on the deposit ticket, "loan from Ed Reynolds." (GX 150).

In a prior proceeding, Chester testified under oath that, although he believed that the Stern-Haskell stock owned by others was freely tradeable stock, he knew that his Stern-Haskell stock was restricted because he was a control person of National Ventures. (Tr. 5993).

Meanwhile, Weitzman began to doubt the business integrity of his colleagues and commenced recording telephone conversations between himself and Stein, Rubinson and Feiffer. (437a-38a).* By June 1969 Weitzman had attempted unsuccessfully to sell some of his 2000 shares of Stern-Haskell stock but had been told by his broker that because his certificates were in the name of Lockwood & Company, he could not sell them without a certificate of ownership. (Tr. 1564-65). Weitzman then requested permission from Rubinson, Stein and Feiffer to sell his shares. At first Rubinson denied him this permission, telling him that such sales would interfere

* Several of Weitzman's tape recordings were introduced into evidence. (GX 70A-70E). In addition, Weitzman kept a draft agreement, relating to Stern-Haskell, between Marinus Laboratories and Investment Bancshares, a corporation connected with Stein, Rubinson and Feiffer (GX 61), which Rubinson had left in Weitzman's office. (448a-49a). It was stipulated that the document was in Chester's handwriting. (Tr. 5985).

with the market they were making in New York and that, since they were buying stock, they would end up buying any stock Weitzman sold. (437a). After waiting a few weeks, however, Stein gave Weitzman permission to sell his shares on the market, which was then almost four dollars per share, and also agreed to buy 500 more shares from Weitzman at two dollars per share. Rubinson and Stein delivered payment to Weitzman in early July in the form of a $1000 check of B'Noth Jerusalem. (441a, 443a; GX 65). Subsequently, in July 1969, Rubinson arranged for Weitzman to sell the rest of his Stern-Haskell shares by directing Nordin to exchange Weitzman's certificates in the name of Lockwood for certificates in Weitzman's name. (443a-47a).

4. The Aborted Mobile Homes Ventures Offering

In late March or early April 1969, Chester entered into negotiations to transform several private corporations owned by the Haun family of Fort Lauderdale, Florida into public corporations by consolidating them under the name Mobile Home Ventures and spinning them off through National Ventures. (Tr. 2936-39). Chester entered into an agreement dated April 29, 1969 with Mobile Home Ventures which was similar to the Stern-Haskell agreement. (Tr. 2951; GX 123).

As in the Stern-Haskell deal, National Ventures purported to purchase the private corporation's stock, this time 200,000 shares for $2000, and Chester simultaneously received an "attorney's fee" in the same amount which he deposited into National Ventures' account, allowing his check to the private company to clear against the private company's own funds. (Tr. 2955-57; 3147-49).

During the early stages of the negotiations Chester told Bosh Stack, a public relations man who represented the Haun family in the transaction, that the public

market for the Mobile Home Ventures shares, would be handled in a manner similar to the Stern-Haskell trading, through the same New York brokerage firm with which Chester had contacts. Chester also said that it would be customary or necessary to offer the brokers free shares or options as an incentive for them to create a public market (Tr. 3003), and that certain owners of large blocks of National Ventures shares would be willing to sign agreements not to sell their Mobile Home Ventures' shares, thereby rendering a decline in price less likely. (Tr. 2963-70). Chester kept Stack informed of the price of Stern-Haskell. (Tr. 2997-98).

During early May 1969, Stack informed Chester that Mr. Haun insisted that in addition to Irwin Germaise's opinion relating to Stern-Haskell which Chester had delivered to Stack, Chester obtain another opinion concerning the legality of the proposed transactions. (Tr. 2945, 2958; GX 108, 121B). Chester sought an opinion from Marc White, a securities specialist in Washington, D.C. White orally informed Chester that he could not render an opinion that the proposed transaction was lawful. (Tr. 3059-60). When Chester insisted on a written opinion, White wrote Chester a letter dated May 16, 1969, stating:

> "The law has generally been that such a transaction is permissible and the recipients of the liquidating dividend would have free trading stock provided they are not officers, directors, 10% holders or in "control" position with the Company. But even today, this would only be true if the overall plan behind the transaction was not developed to avoid registration with the Commission and was not a device to put large blocks of unregistered stock in the hands of the public who have inadequate information about the company. Thus, if it could be established at a later date

that the transactions described above were purposely devised to create a liquidating dividend without disclosure to the public, the Commission might attack all of the corporate transactions of the basis of fraud.

As you know, I inquired from the Commission staff as to their present views in this general area of the securities law and they stated that the subject is under review and they would not be able to issue a "no-action" letter based on our opinion or any other counsel's opinion on this subject.

* * * * *

With these caveats and assuming you could establish your transaction with [Mobile] Homes [Ventures] has some other purpose besides distributing tradeable stock and assuming further that your company is not engaged in a pattern of liquidating dividends and spinoffs, the answer to the two questions posed in your letter is (1) The agreement in and of itself does not violate any SEC rules and (2) the persons receiving stock would obtain freely tradeable stock unless the recipients were officers, directors, 10% holders or in a control position." (GX 120).

At around the same time he was talking to Marc White, Chester executed the Mobile Home Ventures spin off. On May 6, 1969, he announced the dividend to the National Ventures stockholders. (GX 94). Shortly thereafter, National Ventures made the distribution of Mobile Home Ventures certificates dated May 15, 1969. (GX 7A-7F).

Stein, Rubinson and Feiffer, however, refused to manage the Mobile Home Ventures market. Chester attempted on his own to interest brokers in trading the

stock, but was unsuccessful because the brokers would not make the market without Stein's guarantee. (Tr. 2614). Chester then undertook to buy back the nominees' Mobile Home Ventures stock and requested that Hochen and Wetizman relinquish their rights to receive Mobile Home Ventures shares.

Hochen agreed to do this in return for $187.50, which Reynolds * provided in the form of a check, (GX 93; Tr. 2615, 2736); Weitzman also agreed to the waiver, after checking with Feiffer, in return for $187.50, which he received from Chester by check drawn on the account of Stock Transfer Agency and signed by Nordin. (418a-20a; GX 63). Feiffer relinquished his rights in Mobile Home Ventures in the same manner. (418a; GX 64).

Despite Chester's efforts, a public market for Mobile Home Ventures stock never materialized because Stein refused to participate and because the five companies owned by the Hauns could not obtain necessary certified financial statements to be acquired by the newly formed Mobile Home Ventures. (Tr. 2960).

5. The Diston Industries Public Offering

During April or May 1969, Chester arranged with Ardwyn Disner and William Fenton, the owner and general manager, respectively, of Diston Industries, a private shower door manufacturer, to transform Diston into a public company in the same manner that the Stern-Haskell and Mobile Home Ventures transactions had been set up. Chester and Disner executed an agreement similar to that used in the other two transactions on May 28, 1969. (GX 226). Again Chester required that he be paid a legal fee equal to the amount that National

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* Hochen had never discussed this matter with Reynolds.

Ventures would purport to pay Diston for its shares. (Tr. 3346). Reynolds advised Disner and Fenton on the preparation of a description of Diston's business which they called a "mini-prospectus" for distribution to National Ventures' stockholders. (Tr. 3364-65, 3388-89, 3400-01).*

As in the Mobile Home Ventures negotiations, Chester told Disner and William Fenton, the general manager of Diston, that the New York brokers who were trading the other spin-off stocks would also trade Diston. (Tr. 4647).** Chester also said that the prices of the other spin-off stocks had gone up after they began trading in New York and that the brokers would cause Diston stock to go up by trading it back and forth among themselves. (Tr. 4647-48).

Chester gave Disner his own opinion that the transaction would not violate the securities laws. Chester also showed Disner and Fenton a letter which Fenton recalled as being dated during 1968 from a Securities and Exchange Commission official approving a spin-off transactions. (Tr. 4646). Neither Fenton nor Disner could recall Chester's showing them the Marc White opinion letter of May 16, 1969 (GX 120), warning against such transactions. (Tr. 3363-64, 4654-55). Disner asked Chester whether an independent opinion on the legality of the transaction would be necessary, and Chester said that it would not be needed in light of his

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* No such "mini-prospectus" was written concerning Stern-Haskell.

** Fenton testified as above. Disner testified that Chester said Diston might be traded. (Tr. 3390). In the Grand Jury, however, he testified that Chester "more or less assured" him that Diston would come on the market at $1.50 or $2.00 per share. (Tr. 3434-40).

letter from the SEC and the fact that he had done several spin-offs without any problems. (Tr. 4653).*

Following the pattern of the prior distributions of Stern-Haskell and Mobile Home Ventures shares, on or about June 2, 1969 Chester mailed to the National Ventures' stockholders an announcement of the Diston-National Ventures agreement stating that the National Ventures' directors had "concluded that it would be beneficial to the stockholders of National Ventures, Inc. to declare a 100% liquidating stock dividend of the stock which the company owns in Diston Industries, Inc." (GX 96B). Shortly thereafter the Diston shares were distributed to the National Ventures shareholders.

Meanwhile, Stein, Rubinson and Feiffer decided to accumulate the Diston stock distributed by National Ventures to the nominees, Weitzman, Hochen, Silber and Feiffer, as had been done with Stern-Haskell, except that the Diston shares would be accumulated in the name of B'Noth Jerusalem instead of Feiffer. (Tr. 3673). Rubinson asked Hochen to donate his Diston shares to B'Noth Jerusalem. When Hochen refused, Rubinson agreed to pay him $1000 for all but 2000 of his Diston shares. (573a-77a). Feiffer told Weitzman that he Stein and Rubinson planned to donate their Diston stock which was in Weitzman's name to a religious organization in New York. Weitzman was told to execute documents transferring his Diston shares (except 2000 shares which he was to keep as his share for acting as a nominee) to B'Noth Jerusalem. Stein also told Weitzman that he would get a check for $1000 for 500 shares of his Stern-

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* William Fenton testified as above. Ardwyn Disner testified that Chester suggested that Disner get an independent legal opinion (Tr. 3362-63) and that Fenton, who had attended law school but had not been admitted to law practice at the time of the National Ventures transaction, gave him a legal opinion based on Fenton's discussions with an attorney. (Tr. 3374-75). Fenton denied this. (Tr. 4662-69).

Haskell stock which Weitzman wanted to sell. (439a-43a). Subsequently Rubinson delivered to Hochen, and Stein delivered to Weitzman, checks of B'Noth Jerusalem, dated July 9, 1969 in the amount of $1000. (GX 65, 99). Hochen and Weitzman each executed letters transferring 16,750 of their Diston shares to B'Noth Jerusalem. (GX 66, 100).

During October 1969, Rubinson asked Arthur Kravetz, the proprietor of Zenith Securities, whether Kravetz would accept 50,000 shares of Diston stock in return for a participation in the ownership of Zenith Securities. When Kravetz rejected that proposal, Rubinson offered him twenty-five or fifty cents per share if Kravetz would sell Diston to his retail customers. Kravetz declined. (Tr. 4947-49).

B. The Defense Case

Charles Cairnes testified for Reynolds, the only convicted defendant who called any witnesses. Cairnes testified that he was the founder and major shareholder of Marinus Laboratories, a "mini-conglomerate." (Tr. 6205, 6253). Cairnes testified that, although Reynolds owned no stock in Marinus until March 1970 (Tr. 6253), prior to that time he was the financial adviser to the company (Tr. 6256-57), and was an officer and director of Marinus and each of its three subsidiaries, including International Business Consultants, a consulting firm specializing in mergers and acquisitions of which Reynolds was President. (Tr. 6253-54, 6270). According to Cairnes, Reynolds received a salary in 1969 of $5,310, plus credit for stock purchases in the amount of his agreed salary of between $12,000 and $15,000. (Tr. 6251). Cairnes further testified on direct examination that he did not believe that Reynolds had the authority to sign checks of Marinus, but on cross-examination the appropriate bank resolutions (GX 304-08) refreshed his recollection that Reynolds was a signatory on Marinus' accounts. (Tr. 6271-77).

Although Marinus shares had been spun off in the Fall of 1968 by Clarco, a public company (Tr. 6253), Marinus sought to make a public offering of its shares in June 1969 by publishing an offering circular which Reynolds helped draft. (Tr. 6257-6260). Marinus withdrew the offering in the face of opposition from the Securities and Exchange Commission. (Tr. 6249, 6330-31).

Cairnes testified that he became the owner of National Ventures' shares in 1967 or 1968 when Reynolds used either National Ventures or Toy King * stock to repay Cairnes for a loan of between $5,000 and $10,000 made to Reynolds "somewhere between the period of 1962 and 1968." ** (Tr. 6301-05). Cairnes could not recall when the loan was made (Tr. 6302-04) and said that he charged no interest and that Reynolds had not executed any promissory note, although he thought there had been some IOUs. (Tr. 6301-02). Cairnes then turned over the stock to Marinus in September or October 1968. (Tr. 6314).

Cairnes had never met Feiffer and could remember nothing of Marinus' sale to Feiffer of 10,000 shares of Stern-Haskell stock for $15,000. (Tr. 6253, 6297-98). Cairnes testified that Reynolds was the one who handled the sale (Tr. 6279, 6300) and that Marinus used the proceeds received from Feiffer to repay a loan of Infab, another company subsequently acquired by Marinus. (Tr. 6219, 6331).

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* At the trial Cairnes testified that he thought Reynolds had repaid him with Toy King stock. (Tr. 6304-05). Cairnes had told the Grand Jury that he thought he had been repaid with National Ventures stock. (Tr. 6306-08).

** Cairnes testified in the Grand Jury that the loan was in an amount of between $10,000 and $15,000. (Tr. 6303-04).

Cairnes testified that he had met Rubinson and Chester * through Reynolds, but could not recall discussions with either of them concerning Stern-Haskell. (Tr. 6261-6267). Chester never acted as an attorney for Marinus. (Tr. 6267).

Cairnes understood that Reynolds had been an officer of Toy King when it had been active. (Tr. 6318).

ARGUMENT

POINT I

Appellants Were Not Denied Due Process of Law by Pre-indictment Delay.

Appellants claim that their convictions should be reversed because of pre-indictment delay. These claims are without merit.

In *United States* v. *Marion*, 404 U.S. 307 (1971) the Supreme Court ruled, that pre-indictment delay may not be the subject of a valid claim of denial of speedy trial under the Sixth Amendment reiterating that " 'the applicable statute of limitations . . . is . . . the primary guarantee against bringing overly stale criminal charges.' " 404 U.S. at 322. In *Marion*, the Court did, however, adopt the position that the Due Process Clause would require dismissal based on pre-indictment delay shown (1) to have caused substantial prejudice to a defendant's right to a fair trial, and (2) to have been an intentional device of the Government aimed at achieving a tactical advan-

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* Chester's ex-wife Frances Roberts owned 2707 shares of Marinus. (Tr. 6334, 6337; GX 311A).

tage. *Id.* at 324. This Court has repeatedly employed this due process standard. *E.g.*, *United States* v. *Frank*, 520 F.2d 1287 (2d Cir. 1975); *United States* v. *Brown*, 511 F.2d 920, 922-23 (2d Cir. 1975); *United States* v. *Ferrara*, 458 F.2d 868, 875 (2d Cir.), *cert. denied*, 408 U.S. 931 (1972).

The indictment in this case was filed on June 4, 1974, within the appropriate period of limitation. Accordingly, to secure a reversal based on pre-indictment delay, appellants must show some concrete prejudice or prosecutorial misconduct arising out of the delay. While they have strained mightily to do so, they have failed.

In an attempt to demonstrate prejudice, appellants first point to co-defendant Kaye's inability to recall on cross-examination the exact dates of certain events and amounts of cash payments and Ingrid Nelson's statements on cross-examination that certain brokerage houses were no longer in business at the time of trial. However, appellants fail to demonstrate the significance of either the forgotten information or the closing of the brokerage firms. They overlook the fact that Kaye clearly recalled that two cash payments did in fact occur (1135a-39a) during the spring of 1969 (Tr. 4993, 5001), the larger being in an amount of approximately $1,500 or $2,000 (1138a-39a). Kaye also related the substance of several conversations (1132a-35a).* In addition, the Government was able to produce brokerage records fixing the exact dates of the Stern-Haskell trades and the approximate dates of discussions concerning Stern-Haskell. (GX 188-210, 500-669). Indeed, on the basis of those exhibits, the Government introduced a chart of every trade in Stern-Haskell stock. (GX 670). Moreover, it is unlikely

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* Stein's testimony corroborated much of Kaye's testimony.

that any witness' memory would have been appreciably clearer concerning the cash payments, or any other matter of which no permanent record was kept, if the trial had occurred two or three years earlier than it did.

Significantly absent here are any claims by appellants that any witnesses or documents helpful to the defense became unavailable by virtue of the passage of time.* Nor do any of the appellants claim that the passage of time affected their own testimony, since none of them testified.

One reason why the appellants here could not be prejudiced by the pre-indictment delay is that they were put on notice as early as November, 1969 and early 1970—when various defendants were warned of their constitutional rights and interviewed by the SEC—that the Government suspected foul play in the sale of Stern-Haskell stock. The Government's interest was confirmed in September of 1970, when the SEC filed a civil complaint charging the defendants, and others, with violations of the securities laws in connection with transactions in Stern-Haskell stock. (Affidavit of Frank H. Wohl sworn November 1974, filed in opposition to pretrial motion to dismiss). Consequently, this is not a case in which defendants, lulled into believing that their transactions were of no concern to the Government, discarded valuable defense material. Rather, they were on notice beginning just a few months after their illicit transactions that their activities in Stern-Haskell stock were the subject of Government scrutiny. See *United States* v. *Feinberg*, 383

* The appellants made claims prior to trial that Sten Nordin could not be found and Leo Silber had died (Chester's motion to dismiss, dated August 30, 1974); but Nordin testified as a Government witness, and although Silber was alive, he was not called to the witness stand.

F.2d 60 (2d Cir. 1967), *cert. denied*, 389 U.S. 1044 (1968); *United States* v. *Feldman*, 425 F.2d 688 (3d Cir. 1970).

Appellants also argue that they were prejudiced by the fact that the civil trial in *SEC* v. *Stern-Haskell*, 70 Civ. 4065 (S.D.N.Y. 1972) preceded the indictment. Again, they fail to establish any concrete prejudice. Instead, a conclusory claim is made that the prosecution in this case in some way benefited from the "actual experience" of the counsel who represented the SEC in the civil case. Appellants also suggest, without any support, that the civil case gave the prosecution notice of who the defense witnesses might be. The only concrete example suggested—and the only witness any of the convicted defendants called—is Charles Cairnes who testified as a witness for Reynolds. The claim is raised that the Government had a "plethora" of information to cross-examine Cairnes without bothering to note that Cairnes was impeached only with his Grand Jury testimony and documents he turned over to the United States Attorney's office, not any testimony from the civil trial (Tr. 6302-6303, 6306-6309, 6313-6314, 6334).*

Indeed, on balance, the civil proceedings appear to have been of greater advantage at the criminal trial to the defense than the Government. While appellants point to no specific information which the Government obtained through civil proceedings which could not have been obtained through a Grand Jury investigation, the civil trial and SEC investigation gave the defense a preview of a considerable portion of the Government's case, including prior statements of many Government witnesses. For example, defendants repeatedly employed Nordin's civil trial testimony and Kaye's testimony before the SEC in an attempt to impeach them (314a-17a, 1163a, 1165a, 1166a).

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* The record of the civil trial, 70 Civ. 4065, reveals that Cairnes did not testify in that proceeding.

Appellants likewise have failed to make any showing which would support an inference that the Government deliberately sought to delay the filing of this indictment to obtain a tactical advantage. Appellants appear to rely on the fact that the SEC conducted an investigation into Stern-Haskell during 1970 and then filed a civil suit against the defendants and others, which was tried in January and February, 1972, to construct an argument that the Government was ready to proceed to indictment long before it did so. This claim erroneously assumes that a case strong enough for a civil injunction action automatically warrants an indictment. Here, however, the SEC criminal reference report is dated November, 1972, indicating that criminal proceedings were not a foregone conclusion at the time of the related proceedings.*

The pre-indictment delay here is explained in part by the fact that significant portions of the proof on which the Government based this prosecution did not become available to the Government in time to proceed more rapidly. Most notably, co-defendants Sidney Stein and Philip Kaye, both of whom pleaded guilty and testified as Government witnesses, first related the facts of this case to the Government over four years after these crimes were committed. See *United States* v. *Frank*, *supra*, 520 F.2d at 4446. Kaye testified falsely in the administrative investigation (1163a-66a), and Stein asserted his constitutional rights and remained silent concerning

* The SEC referred this matter to the Department of Justice for criminal prosecution by a report dated November, 1972, recommending prosecution in the Southern District of Florida, and the Department of Justice referred it to the United States Attorney for the Southern District of New York by letter dated August 15, 1973. The Grand Jury investigation commenced in January, 1974. (Affidavit of Frank H. Wohl, sworn to November 1974, filed in opposition to pretrial motion to dismiss).

Stern-Haskell as late as July, 1973 (Tr. 4119-23). Accordingly the record here is not one of purposeful delay by the Government, but rather dogged efforts in successive investigations over five years to ferret out the truth and bring these defendants to justice. See *United States* v. *Ferrara, supra.*

In the context of this case, Judge Waterman's language in *United States* v. *DeMasi*, 445 F.2d 251, 255 (2d Cir.), *cert. denied*, 404 U.S. 882 (1971) is, we submit, directly in point:

> "Although the constitutional and social imperatives in the speedy trial concept are *deeply* embedded in our jurisprudence, nonetheless we have also recognized that careful investigation, even at the price of delay, is to be cherished, inasmuch as '[t]ime-consuming investigation prior to an arrest minimizes the likelihood of accusing innocent parties and may facilitate the exposure of additional guilty persons.' "*

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* Appellants rely on *United States* v. *Parrott*, 248 F. Supp. 196 (D.D.C. 1965), in which, based on a strong showing of prejudice, defendants obtained dismissal of an indictment because of pre-indictment delay and parallel civil proceedings. More in point here is *United States* v. *Parrott*, 315 F. Supp. 1012 (S.D.N.Y. 1969), *aff'd*, 425 F.2d 972 (2d Cir.), *cert. denied*, 400 U.S. 824 (1970) in which, under circumstances similar to those present here, Judge Weinfeld denied a motion for dismissal based on pre-indictment delay. There, Judge Weinfeld observed that the SEC is duty bound to seek injunctions and other authorized remedies when it discovers violations of the statutes which it is charged with enforcing and that a civil suit is in itself notice to defendants that their activities appear to have violated the law. Judge Weinfeld also specifically noted that the Second Circuit has not adopted the theory underlying *United States* v. *Parrott*, *supra*, 248 F. Supp. 196. See also *Kroll* v. *United States*, 433 F.2d 1282, 1286 (5th Cir. 1970), *cert. denied*, 402 U.S. 944 (1971).

POINT II

Neither Rubinson nor Chester Was Denied the Right to Counsel.

Rubinson, a 55 year-old businessman, and Chester, a 49 year-old attorney, each proceeded in *propria persona* in the trial of this matter. Both assert they were thereby denied their right to counsel. These claims are without merit.

The basic legal principles involved here are well-settled. Plainly, Rubinson and Chester had a right to the assistance of counsel in their defense, United States Constitution, Sixth Amendment; *Johnson* v. *Zerbst*, 304 U.S. 458 (1938); each had a concommitant right to represent himself, *Faretta* v. *California*, — U.S. — (1975), 43 U.S.L.W. 5004 (June 24, 1975); *United States* v. *Plattner*, 330 F.2d 271 (2d Cir. 1964); and if either was able to afford an attorney and did not retain one, such election was an effective waiver of the right to assistance of counsel. See, *e.g.*, *United States ex rel. Davis* v. *McMann*, 386 F.2d 611, 618 (2d Cir. 1967), *cert. denied*, 390 U.S. 958 (1968); *United States* v. *Arlen*, 252 F.2d 491, 494-95 (2d Cir. 1958). See also *United States* v. *Terry*, 449 F.2d 727, 728 (5th Cir. 1971); *Spevak* v. *United States*, 158 F.2d 594, 596-97 (4th Cir. 1946), *cert. denied*, 330 U.S. 821 (1947).

During the proceedings in this case, Judge Motley repeatedly found that Rubinson and Chester were financially able to obtain counsel, and the record contains a myraid of facts and circumstances which fully support her findings.* The fundamental question here is, did

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* The subject of Chester's and Rubinson's financial status arose time and again throughout the course of these proceedings

[Footnote continued on following page]

the trial judge err when she denied the applications of Rubinson and Chester for court-appointed counsel pursuant to the provisions of the Criminal Justice Act of 1964 (18 U.S.C. § 3006A) (Criminal Justice Act) and the Plan Under The Criminal Justice Act of 1964, as Amended to February 11, 1971, United States District Court, Southern District of New York (S.D.N.Y. Plan)?

A. Rubinson.

When these proceedings commenced with arraignment on June 17, 1974, Rubinson had been actively represented in this case by a Miami-based attorney, Frank Freeman (52a), and Rubinson so informed District Judge Knapp. (36a-37a). At the first pre-trial conference on June 27, 1975, Judge Motley immediately took up the question of counsel, and Rubinson told her that he represented himself (43a). He then gave a number of reasons explaining his desire to proceed *pro se*. Among them was that he knew one of the chief Government witnesses; that his lawyer was in Europe; and that in any event he did not want to use him because, ". . . I am more familiar with this case than anybody is. I think I have a very good defense". (45a, 48a-49a). Judge Motley carefully urged Rubinson to get a lawyer, warned him of the hazards of representing himself, alerted him to the complexities of the case, and told him that she could not act as his attorney. (51a-52a). At this conference, the court fixed a trial date of January 14, 1975 and ordered all pre-trial motions to be filed by September 1, 1974.

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after Judge Motley made her original determinations. Each time further development of the facts only served to highlight the ability of each to retain a lawyer and, particularly in the case of Rubinson, duplicity in dealings with the court on the subject. Clearly, in a review of the validity of Judge Motley's rulings, this Court is entitled to consider the entire record and all admissions by the appellants on the subject. *Cf. United States* v. *Plattner, supra,* 330 F.2d at 276.

There the matter rested until December 5, 1974 at the next pre-trial conference, when Rubinson announced for the first time that he wanted to petition the court for appointed counsel. (55a). Asked about his previous assertion that he would represent himself, Rubinson told the court that he had said that because he was being incarcerated. (66a). He then told the court:

> "In the last six months [since I said I would proceed *pro se*] my financial status has changed considerably being that I was away, and at that time I probably could have afforded one, where at this time I can't afford one". (67a).*

This statement was belied subsequently when Rubinson repeatedly asserted he had not had any assets or income for two or three years. But at that time, Judge Motley accepted his unverified statements at face value, inquired briefly into his financial status, and agreed to appoint counsel, conditioned on the filing of a sworn financial affidavit setting forth facts which would support his application. Twice during the December 5, 1974 conference prospective appointed counsel declined to take the case, and although Rubinson was repeatedly made aware of the necessity of filing the affidavit, he apparently never bothered to fill it out or file it. (60a, 61a, 63a).

As difficulties developed in finding counsel to represent Rubinson, and Judge Motley became aware that Rubinson might not have been told formally of his right to have court-appointed counsel, Rubinson changed his tune and said, "If Your Honor so rules, I will represent

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* In connection with a conviction for securities fraud arising in the Eastern District of New York, Rubinson had been incarcerated for only two months and had been released about two months prior to this conference.

myself." (74a).* Overnight, the trial judge reviewed the transcript of the proceedings of June 27, 1974, where Rubinson had insisted on representing himself; it alerted her to the possibility that Rubinson was embarked on a strategy—not a sincere or honest attempt to obtain counsel. (87a-88a). This was doubtless underlined when, on December 6, 1974, at the continuation of the pre-trial conference, Rubinson supplied yet another reason for changing his mind about *pro se* representation. He now said it was because "this case seems to be getting more complicated than I thought it would get, so therefore, I would request counsel at this time". (87a). Moments earlier he had asserted that he had never meant to represent himself at trial, but only on a pre-trial "temporary basis". (83a). Again the court questioned him as to his resources. He provided no more information than he had the previous day. (88a-89a).

The facts which Rubinson had offered in support of his application at that point in the proceedings were:

1. That from 1943 to 1969 he had been in the appliance business;

2. That he was presently employed by a travel agency in Miami where he had worked for just a short time, interrupted by his incarceration;

3. That he had no real property;

4. That his wife and daughter lived with him;

5. That his son was paying his fine of $575-600 a month in connection with one of his convictions. (55a-58a).

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*Taken alone this humble remark is harmless, but in the context of his earlier assertion of the right to proceed *pro se*, his later shift in grounds for wanting to do so, and his later performance at trial, it can be interpreted as one of many of Rubinson's efforts to confuse the record and create appellate issues.

Rubinson also made it clear that any additional facts were going to have to be ordered out of him. (59a).*

On December 20, 1974, the court again addressed the question of Rubinson's application for appointed counsel. He was provided with a blank financial affidavit form. (109a). But he apparently chose once again not to fill it out. The Government, opposing the appointment, called the court's attention to several matters apparently bearing on Rubinson's financial condition. Part of that offer was a public record in which District Judge Tenney had ordered an examination of Rubinson's financial affairs in light of his finding that certain corporations had been created by Rubinson solely to permit him to avoid disclosing his financial affairs. *SEC* v. *Radio Hill Mines Company*, 70 Civ. 3286 (S.D.N.Y., op. of Judge Tenney, February 20, 1969). The Government also alleged that Rubinson lived in a wealthy community and drove a Rolls Royce and a Maserati together with his son; that he still had substantial corporate interests; and that he carried on his financial affairs through intricate structures which were family connected. (109a-12a).

Rubinson then, for the first and last time, testified under oath regarding his finances.** He was asked if he had received any income from any source in the last ten months and if he had received any salaries, interest, income from rental properties or dividends. To each question, save those with reference to rental properties, he

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* It was during this two-day conference on December 5 and 6, 1974 that Judge Motley denied Rubinson's application on the basis of his prior waiver of counsel. (90a).

** It is worthy of note that even the undated, vague affidavit form which appears in Rubinson's post-trial motion (2067a), is not sworn to, nor has it ever been filed with the court in connection with any application for appointed counsel. Thus, with the exception of his evasive testimony at this hearing on December 20, 1974, Rubinson appears to have set out to make what representations he could without facing the normal deterrents against false applications for counsel.

hedg d his answer until admonished by the court. (114a-15a). He did tell the court he had received loans during the last twelve months from "my mother-in-law, my father in-law, and my son." His father-in-law, he said, gave him money necessary to run his household and for personal expenses. Likewise, he said, his mother-in-law loaned him household expenses. He did not know how large his son's home was, although it was located around the corner from him on Hibiscus Island in Miami Beach, Florida. He had no idea how much his son had given him, but it was "enough to live on." Rubinson further testified that this arrangement—his living on loans from his family—had been going on for at least three years. He did not know, however, whether it was longer than that. His father-in-law and he, he said, were both officers of Allen Electronics, intermittently trading positions of president and secretary, but he did not know where his father-in-law got the money Rubinson had been borrowing from him. Rubinson also could not remember how much money he had borrowed. (115a-23a).

Then the court asked him the key question and, with considerable effort, established that Rubinson's home on Hibiscus Island was built for about $20,000 in 1950 and a $40,000 mortgage had been taken on it in 1973. (123a-26a). From this the court deduced that the house at present must be worth $80,000 to $100,000, with a substantial equity, and held that Rubinson had the financial ability to employ a lawyer. (Tr. 12/20/74, pt. 2, at 7-9).*

Thus, Rubinson came to represent himself at trial. And, it is relevant to note, he brought his wife with him

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* Judge Motley specifically said that she was relying solely on Rubinson's sworn statements with respect to the home and was not relying on the allegations made by the Government. Clearly, the Judge had heard enough to satisfy herself that Rubinson had the ability to retain counsel, and that is all that was required. See p. 50, *infra*.

from Florida. They promptly took a $52 a day suite at the Park Lane Hotel in Manhattan where they resided for ten days before moving, for the duration of the eight-week trial, into $775 a month accommodations at the Town House, at Park Avenue and 38th Street. (1941a-42a). It is indicative of Rubinson's continuing endeavor to deceive the court that, when asked for his New York location in open court during the first day of trial, he managed not to answer by implying that he would stay with his mother in Brooklyn. (138a). It is also worthy of note that this expenditure did not negate at least an occasional return to Florida on weekends. (Tr. 668-69).*

The facade of Rubinson's poverty did not collapse until the trial was over. By the time Rubinson was sentenced and free on bond pending appeal, the trial judge was confirmed with respect to her estimate of the value of Rubinson's house (1970a, 1996a) and many of the Government's previous allegations were admitted. (Tr. Rubinson Sentence, 5/15/75, at 9; 1954a-55a).

Rubinson arrived at his sentencing with his newly retained appellate counsel.** The court "learned" over the next few days, while Rubinson endeavored to secure his release on bail pending appeal, that he had been a successful businessman until 1969 when he met Sidney Stein who led him astray. (Tr. Rubinson Sentence, 5/15/75, at 8).*** He then "squandered" all of the money he had accumulated during 30 years in business and left his family "destitute," except for a couple of automobiles and the

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* It is also noteworthy that, in the midst of his plea for appointed counsel, Rubinson indicated to the court that he could come to New York from Florida to confer with counsel "whenever it is necessary for me to come up." (73a).

** No stranger to Rubinson or the facts of the case, Mr. Andrews, appellate counsel, had represented Levine and Wax at trial.

*** His success from any ventures after 1969 was not discussed, although notably the money made in the Stern-Haskell transactions has never been recovered. (1971a).

house, which he signed over to his wife and daughter, not, he claimed, to avoid disclosure of his assets, but to protect them from him. (Tr. Rubinson Sentence, 5/15/75, at 9). He also, however, apparently managed to support his mother (1933a). The court was also told that Rubinson had advised the hotels where he had stayed during the trial that he was employed by "Jaragua Cassine." Counsel tossed this off as a hotel connected with the travel agency where Rubinson originally said he worked, and where he made no money. Other of Rubinson's business interests were similarly disposed of. (1942a-43a).

But, it was finally revealed to the court that Rubinson was, in fact, employed by a company called Brown, O'Shea in Florida (1995a), by a man named Mario Pinto who was not only paying Rubinson $1200 a month, but was paying his attorney's fees on appeal. (2024a-25a). Rubinson said he had been working for Pinto "gratis" prior to May 1, 1975.

Also, as Rubinson labored to secure his release on appeal, more evidence emerged of his ability to acquire money when needed. He was able to produce a deed in lieu of foreclosure on the Hibiscus Island home and, immediately upon hearing of a cash requirement for the bond, to produce a promise of a $10,000 check from his mother-in-law with one quick call from a phone in the magistrate's office. (2012a-14a). His evasiveness did not recede altogether, however. He did not know where the $10,000 was coming from, but he knew she kept money in the house "under this, in that, in a clothes drawer". (2017a). But, wherever it was coming from, she had always given cash to Rubinson and his wife whenever they requested it. (2018a).

Then, in very nearly his last words before the District Court, Rubinson said with respect to his in-laws, "without me, your Honor, they were like destitute". (2021a).

The trial judge made two related determinations concerning the question of Rubinson's representation. She found that Rubinson was financially able to afford his own attorney and that he had intelligently waived his right to counsel when he had initially asserted his intention to proceed *pro se*.* With respect to both findings she noted that Rubinson's pointed evasiveness had impeded the development of the issue and that his *pro se* representation at trial was part of a deliberate strategy.** These conclusions find a plethora of support in the record.

It is abundantly clear from the record as a whole that Rubinson was more than able to afford his own attorney using anyone's standard. Every reasonable inference to be drawn from his evasive testimony is that Rubinson had

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* Her reasons and findings of fact are summarized in an opinion dated July 28, 1975. (2034a-38a).

She also expressed her finding on the record, at several junctures during the proceedings, *e.g.*,

> "Mr. Rubinson, you are making a lot of statements in the record. Now, you have a purpose for doing that and I know what it is. . . . I think the record is clear that you have refused to follow the instructions of the Court with respect to matters which would obviously be helpful to you in your defense." (Tr. 2664-66).
>
> * * * * *
>
> "I have warned him of the problems [of representing himself] and the record will reflect that Mr. Rubinson's conduct on the trial was trying to disrupt the trial, to prolong the proceedings and to constantly disobey the Court's orders. All that is in the record." (1962a-63a).

(See also 508a-09a; Tr. Rubinson Sentence 5/15/75, at 13; 1941a-42a, 1947a, 1951a).

** Rubinson's deliberate design—with the purpose of creating spurious appellate issues and placing the trial judge in a position where she could have appeared to the jury to be arbitrarily depriving him of his rights—could itself be a basis for finding he had effectively waived his right to counsel, regardless of his financial status. *United States ex rel. Davis* v. *McMann, supra,* 386 F.2d at 618-19; *United States* v. *Arlen, supra,* 252 F.2d at 496.

and has substantial resources which he never revealed to the court. Certainly it is reasonable to infer that the transfers he has admitted, of the house and cars to his family at about the time that his legal problems began to mount, were motivated as much from his desire to protect his assets as to protect his family. Further, the fact that somehow this "destitute" family managed miraculously to maintain this "destitute" man in relative comfort in his four-bedroom home, with his Rolls-Royce, and still supply funds to meet his every need, *e.g.*, his fines, his living expenses in New York City, his living expenses in Florida, his bond in this case, is nothing short of incredible, without some undisclosed assets.*

The record is also replete with indications that it was part of Rubinson's trial strategy to place the court in the untenable position of either appointing counsel for him, without regard to his eligibility, or of facing the consequences of his proceeding *pro se*. At one point, Rubinson told the Assistant United States Attorney in charge of this case that he thought he would proceed *pro se* because he had heard at the halfway house that by so doing he could tell his story to the jury without being cross-examined. (135a-37a).** This Court has recognized that

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* Appellant argues that, under certain interpretations of the Criminal Justice Act, the court should not look to family assets when making a determination of an individual's eligibility under the Act. This is manifestly not a case where such an interpretation should even be considered. From the evidence, it is clear that there has been a deliberate transfer of assets from Rubinson to his family and that there was an agreement that the family would, thereafter, pay Rubinson's way. Further, he has demonstrated, when he obtained appellate counsel, that he had the wherewithal to obtain trial counsel.

** In this light a few background facts which emerged at various times throughout these proceedings are relevant. Rubinson had little formal education, but had been a successful businessman for 25-30 years. He had been an officer of a number of companies,

[Footnote continued on following page]

such strategies are not mere imaginings of District Judges and Assistant United States Attorneys. As noted in *United States* v. *Plattner*, *supra*, 330 F.2d at 276:

> "[O]ne of the by-products of the recent developments in the law relative to the assignment of counsel in all but a few cases of indigent defendants, has been an awareness of the prison population . . . of the possibility of manipulating the basic rule in a fashion such as to produce a record of confusion on the subject, and to give the accused the opportunity to claim reversal in the event of conviction on the ground that his rights under the Fifth and Sixth Amendments had been infringed. The ingenuity of these individuals, especially the recidivists, betokens a high if misdirected intelligence." *

It is, we submit, clear that the Criminal Justice Act can be used in an attempt to bludgeon a District Judge into appointing counsel at the public's expense simply to avoid an appellate issue or the often unpleasant problems which attend to a *pro se* defense. And it is the Govern-

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most notably Allen Electronics, a Florida-based corporation. By the time he was indicted in May of 1974 in this case his business dealings had involved him in at least three civil actions in the Southern District of New York and he had been convicted for perjury in this district and stock fraud in the Eastern District of New York. Further, between August 5, 1974 and October 10, 1974, he was incarcerated in connection with the stock fraud case and, then, lived in a halfway house in Florida up until the time of this trial. In other words when Rubinson came before Judge Motley, he was no stranger to the court process or to self-styled experts on trial strategy.

* *Plattner* concerned the waiver of right to counsel by an affirmative assertion to proceed *pro se*, but its practical warning is no less applicable to applications for court-appointed counsel. See, *e.g.*, *United States* v. *Kelly*, 467 F.2d 262 (7th Cir. 1972), *cert. denied*, 411 U.S. 933 (1973).

ment's contention that this is precisely what Rubinson set out to do.*

It is to the trial judge's credit that she was not intimidated. Rubinson did, indeed, go to trial without an attorney. In doing so, as could be expected, he did his best to create a picture both for the jury and the record of a pitiful defendant forced by the tyrant on the bench to face these charges without the assistance of counsel.**

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* Rubinson answers this argument by suggesting that, if the Government felt that he was setting out on a deliberate course to disrupt the trial and create appellate issues, the simple solution was for the Government to ask the Judge to assign counsel for him. This not only demonstrates a total disregard for the policies underlying the Criminal Justice Act (and for the fact that it is the court, not the United States Attorney's Office which is responsible for its administration), it also lends support, perhaps unwittingly, to the Government's view that one prong of Rubinson's strategy was to wear down and intimidate the District Judge into approving this unnecessary and unwarranted expenditure of public funds.

** He made sure the jury knew it was the Judge who had "deprived" him of counsel, *e.g.*,

> "I didn't ask to be represented here by myself; I asked you for an attorney and you appointed two attorneys and took them away from me . . . I don't know how to protect myself . . . I am sitting here. I have no business sitting here . . . You don't give me a lawyer and now you don't let me talk to the man . . . I have nothing else to say. I can't say no more. We will see what happens." (Tr. 762-63).
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> * * * * *
>
> "Your Honor, I would like to say this. Mr. Wohl has much more experience than I have. He's not here trying to defend himself. I am. I will try to question this witness the best way I know how, and if Mr. Wohl will refrain from interrupting, then maybe the jury will be able to get a true picture here of what happened on the defense side, not only what happened on the plaintiff's side." (Tr. 1624-25).

In this endeavor, he was occasionally assisted by the attorney who now represents him on appeal. (Tr. 4249-50).

And while it is true that he occasionally bumbled, he was also rendered assistance by the trial judge on numerous occasions, despite the fact that it became abundantly clear early in the trial that he was determined not to follow her instructions.* He also managed to bait the witnesses, and generally to posture before the jury as an unsworn witness on his own behalf.** In other words, even though his performance at trial is not relevant to the issue here, *cf. United States* v. *Duty*, 447 F.2d 449, 450-51 (2d Cir. 1971), Rubinson presented an active defense, albeit on his own terms. If he miscalculated and his tactics eventually contributed to his well-warranted conviction, his predicament was only of his own making.***

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* Judge Motley's attempts to assist Rubinson and evidence of his resistance, and her patience with him are spread throughout the record. (See, *e.g.*, Tr. 757-58, 792-93, 1205, 1210, 1238-39, 1284-85, 1487-88, 1583, 1584-87, 1632-33, 1673-74, 1696-97, 1700, 1939, 2551-52, 2639-42, 2665-66, 3702-04, 4956-58, 5014, 6002, 6446-64, 6487, 6490-91).

** Rubinson, like Chester, had the advantage of a total grasp of the facts about which many Government witnesses testified. He knew, because, he never hesitated to tell the jury, he had been there. Time after time, Rubinson, when questioning witnesses and in colloquy with the court in the presence of the jury gave, in effect, unsworn statements about the facts in the case and managed to successfully get his defense before the jury without taking the witness stand. His summation is purely and simply his side of the story, replete with uncross-examined factual assertions, references to documents not in evidence, protestations of innocence and good character. (Tr. 6680-6704). (See also Tr. 756-64, 1568-69, 1655, 2654-55, 3070, 3709, 3728-30, 3733, 3747, 3758, 3771, 3780-81, 3821, 4247, 4383-84, 4385-86, 4967.

*** It must also be noted that Rubinson was capable, when he wanted to be, of handling himself in a competent manner. It was Rubinson who raised and argued the attack with respect to Count Twenty which led to the court's dismissal of that Count against himself and Chester (Tr. 5547, 6368-72). (See also Tr. 1575-76, 2645, 2652, 2782-84, 5261-66).

B. Chester.

Chester's case is best characterized by his statement at sentencing, when he again moved for appointed counsel, this time for appeal:

> "I don't want the Court to be misled by the swimming pool in the back of the house. It's a pond. 14 x 28." (Tr. 5/15/75, Chester Sentence, at 10).*

Other facts, presented by Chester during pre-trial proceedings, were that he had been practicing law for 25 years and doing securities work; that he was making $25,000 a year as a corporate counsel; and that he owned a house in Miami, in which he had an equity of $10,000. He also represented to the trial judge that as soon as he came to trial, he would be dismissed from his job and would be living from week to week. (59a-60a; Tr. 12/6/74, at 79-81).

On the day trial commenced, January 22, 1975, Chester renewed his motion for appointment of counsel and told the court, *inter alia*, that he had to come up to New York on an airplane which was "very expensive" (Tr. 1/22/75, at 24-26).** During the trial, he indicated that not only was he managing to pay for his own expenses, he was also paying for defendant Reynolds'. (Tr. 2497).***

On March 23, 1975 after the jury returned the verdict of guilty, he informed the trial judge—during the bail argument—that he was still working at GAC, the corporation he had neglected to name during his applications for

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* Presumably he meant 28 feet, not yards.

** Chester apparently flew back and forth to Florida every weekend.

*** At one time during trial, he even offered to pay the attorney's fees of one of the Government's witnesses. (Tr. 5158).

counsel. (Tr. 7453). But not until sentencing did he inform the court that he was being paid by that company until June 1, 1975; that his wife had been and was still employed as a stewardess; and that rather then being "very expensive," his airplane trips to Florida each weekend during the trial had cost him only $12. It was also revealed that he and his wife owned two cars and that during 1974 his income had been around $29,000. He also had not previously told the court about $7,500 he had earned from his private law practice in 1974. (Tr. Chester Sentence, 5/15/75, at 2-3, 12). He further revealed that, when interviewed by the probation office, he had estimated his assets at $41,500 and his liabilities at $30,000. (Tr. Chester Sentence, 5/15/75, at 13).

Chester's application for appointed counsel was heard by two judges of the District Court, once by Judge Knapp at Chester's arraignment on June 17, 1974 (104a-05a), and three times by Judge Motley, first at a pre-trial conference on December 5 and 6, 1974,* again on the opening day of trial on January 22, 1975 (Tr. 1/22/75, at 24), and again at sentencing, on May 15, 1975 (Tr. Chester Sentence, 5/15/75, at 2-16). Each time Chester set forth essentially the same facts, augmenting them on various occasions in open court. His application was consistently rejected. He then moved this Court for appointment of counsel on appeal. (Chester Motion, filed

* Judge Motley first made a preliminary determination that she would grant Chester's motion based on his bare representations (59a-60a, 26a), telling him she would require a sworn affidavit, and warning him that he would have to repay the money if it turned out he could afford counsel. The following day she once again heard Chester on the subject (Tr. 12/6/75, at 79-81; 104a-05a), and changed her mind prior to any actual appointment. The Judge's reasons for her change of mind were not stated on the record, but undoubtedly her initial reaction was tempered by a chance to reflect overnight on the facts presented. She also interrogated him more closely on December 6, 1974.

June 9, 1975). He, again, stated essentially the same facts which had been developed in the court below, and his motion was denied. (Order filed July 16, 1975).

Accepting Chester's statement of his financial situation at face value, we submit that this is clearly not a case intended to be covered by the Criminal Justice Act. Further, even if the case were to be considered borderline, there was clearly no prejudice to Chester in this trial. The record cannot, of course, capture the flavor of the performance Chester turned in for himself, but it is reflected perhaps in his selection by all defense counsel to sum up to the jury last, and by one of the experienced defense attorneys when he said: "I could not have done half the job [Chester] does for himself. That is the fact." (Tr. 5162). (See also Tr. 891, 916, 5007).

Furthermore, the record reveals that Chester, despite his side remarks for the benefit of the jury, clearly did not learn his law from the movies.* Also, Chester filed nine pre-trial motions and argued them with skill. (Tr. 12/6/74, at 152-70). Indeed, it was Chester who filed the initial motion attacking the jurisdiction of the Grand Jury, an issue this Court regarded as important enough to consider on the merits in a pre-trial mandamus proceeding.** See *Wax* v. *Motley*, 510 F.2d 318 (2d Cir. 1975).

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* A good example of Chester's technique occurred during Nordin's direct examination. The witness' recollection failed him, but he said something might refresh his recollection. The prosecutor asked the witness what that might be. Chester objected several times, building to the line:

> "Objection ... I don't know anything about defense, but I never saw a witness, even in a movie, ask the prosecutor what he should ask."

The court was required, as she was on many occasions after Chester spoke, to silence the outburst of laughter in the courtroom. (Tr. 557-58).

** Chester's motion was dated December 27, 1974. The attorneys who filed similar motions were more than a week behind him.

It was also Chester who objected reflexively, alone among the defense attorneys, when the trial judge gratuitously gave the Government four extra challenges to the jury. (Tr. 1/22/75, at 68-69). Chester also articulated the main thrust of the good faith defense (Tr. 83-90) and never let a witness get off the stand without finding some way to draw the jury's attention to it.*

Before the jury, Chester had a unique advantage. He was an attorney completely familiar with the facts of the case. He personally knew many of the Government witnesses and he played them with down-home savvy,** as he plied the jury with his jests *** and the Judge with his

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* This was confirmed by Chester in his summation when he drew the jury's attention to the fact that he had consistently drawn their attention to it. (Tr. 6990). (See Tr. 4625-26, 6478).

** See, *e.g.*, Chester's examination of Moore (Tr. 258-62); Nordin (Tr. 793-1044, 1355-82); Hochen (Tr. 2658, 2677-2749, 2915-24); Stack (Tr. 3011-55); White (Tr. 3063-65, 3067, 3078-93); Myrtetus (Tr. 3162-75); Torelli (Tr. 3275-95); Disner (Tr. 3343, 3375-98, 3440-43); Stein (Tr. 3923-4036); Fenton (Tr. 4657-90).

*** The butt of Chester's asides was, often enough, the Assistant United States Attorney in charge of the Government's case. For example, during his cross-examination of Weitzman, Chester asked:

> "Q. How much money did you make in the old kick from the Diston Stock?
>
> Mr. Wohl: I will object to that, I would appreciate [it] if Mr. Chester would give us the South Florida definition of what a kick is?
>
> Mr. Chester: The southern language we have a problem, Mr. Wohl, you know this Harvard technique of yours, I get complicated with. I am from Key West University, so we have a problem.
>
> Q. How much money did you make on the sale of Diston Industries stock." (Tr. 2011).

Chester, according to his presentence report, attended both Dartmouth and Middlebury colleges.

On many other occasions, Chester was not as affable in his remarks about Mr. Wohl, for example, one of Chester's many

[Footnote continued on following page]

sheer audacity.* His cross-examination of Sten Nordin alone, demonstrated his consummate proficiency in a courtroom, his thoroughness and his strategy. (Tr. 793-1044, 1355-81). Chester never took the stand, but in his

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speeches occurred during his cross-examination of Stein in front of the jury.

> "I want to find out how he can walk around the streets for eleven years and suddenly I am picked up and sent up here to New York, being tried in a case like this, having a man sit up there making these statements that 'I can't remember whether it was in New York or Hong Kong or anything else, but I remember conversations.' These are poll parrots. I haven't seen one man come in here—well, maybe several of them told the truth, but many of them say yes or no to what Mr. Wohl says. . . .
>
> The Court: Refrain from making [improper comments] and shouting at the U.S. Attorney." (Tr. 4008).

See also Chester's summation where the language becomes more virulent. (Tr. 6983-7056).

* Chester's staged improprieties ranged from relentlessly pursuing Nordin about his gender (Tr. 799, 818), his age (Tr. 839-40, 863, 871, 891-92, 1228) and the nocturnal activities of his teenage bride (Tr. 1014-23; see also Tr. 860-62, 908-09, 910) to attempting to cross-examine Stein as to his teddy-bear (Tr. 4011-12). The Judge was finally prompted to say:

> "My ruling is that it appears what you are out to do now is to embarrass the witness and to turn this trial into some kind of circus and so the Court's ruling is that you may not ask Mr. Stein about his psychiatric history. That goes for you only. So the ruling applies to you only. And that's supported by your conduct throughout this trial as the record will disclose that you have repeatedly, repeatedly, disobeyed the orders and instructions of this Court, and you are now prohibited from further turning this trial into a circus by going into that psychiatric history." (Tr. 4012-13).

Indeed, the court had warned Chester over again about the consequences of his flights of fancy with witnesses. (See, *e.g.*, Tr. 830-31, 1015-16).

eight-week run in the courtroom he never left center stage.* He walked the line between straight-man and fall-guy and no one can doubt that he managed to get his defense more clearly before the jury than any other attorney could have acting on his behalf.** As Judge Motley said, "[w]hen this case is reviewed on appeal, all the Court of Appeals has to do is to read Mr. Chester's closing statement to the jury and they will know what we had to put up with in this case". (Tr. 7308-09).

C. The Correct Legal Standards Were Applied Below.

Upon the applications of Chester and Rubinson for court-appointed counsel, Judge Motley was required, by the terms of the Criminal Justice Act, to "satisfy" herself after "appropriate inquiry" whether or not each was "financially unable to obtain counsel". 18 U.S.C. § 3006A (b). The Judge made inquiries with respect to both appellants and was manifestly satisfied that neither was eligible for court-appointed counsel. Thus, it remains only to determine here whether her inquiries were "appropriate" and her conclusions based on a proper standard of eligibility.

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* His large rectangular name tag helped, of course (Tr. 18-19), maintain his presence before the jury during those necessary periods in the courtroom when others were doing the talking. And he too repeatedly reminded the jury of his "reluctant" *pro se* status. (See, *e.g.*, Tr. 916-17; 3923).

** Chester stated his theory of defense over and over again in questions to all witnesses, and Chester, like Rubinson, used his *pro se* status to put his side of the story to the jury through factual statements to witnesses or in colloquy with the court in front of the jury. (See, *e.g.*, Tr. 275, 278, 627, 812, 840, 858, 869, 915, 928, 1008, 1805, 2650, 2204, 3063-64, 3286, 3291, 3923, 3925, 5478, 5485, 5570, 6265, 6309). Chester's opening (Tr. 83-90) and his summation (Tr. 6983-7056) were tantamount to his taking the stand and testifying. But, two important factors were missing, an oath and cross-examination.

The characteristics of an "appropriate" inquiry are not defined in the Criminal Justice Act,* nor does the sparse case law on the subject shed much light.** But clearly Congress has not funded or staffed the courts to make a full-scale investigation of each application in order to administer the Act, and it is apparent that the Act does not envision a full-scale adversary hearing to develop the picture for the court. What is contemplated is an informal proceeding where the defendant who applies for appointed counsel has the burden of disclosing financial facts to the court. The court then, in the exercise of its discretion and good sense, is required to inquire until it is satisfied that it can make an informed decision about the defendant's eligibility. An "appropriate inquiry" is no less, and should be no more. Plainly, then, the court has a duty to direct the defendant's attention to the type of facts which may be pertinent, but if the initial facts developed indicate that the defendant is not eligible, the court need not inquire *ad nauseam*. Similarly if, in the

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* The S.D.N.Y. Plan goes somewhat further by indicating that the District Judge must "inquire into and . . . make a finding as to whether [a] defendant is financially able to obtain counsel" and directing that all statements by defendants in such an inquiry must be in a sworn affidavit or under oath in open court. S.D.N.Y. Plan, III(a), at 4.

** Appellants rely heavily on *Wood* v. *United States*, 387 F.2d 353 (5th Cir.), *on remand from Wood* v. *United States* 389 U.S. 20 (1967), but that case does little to advance the question or the resolution of it. It merely called for full exploration of the subject of eligibility after the Solicitor General conceded before the Supreme Court that the inquiry below had been inadequate.

United States v. *Cohen*, 419 F.2d 1124 (8th Cir. 1969), also begs the question. Clearly, if a defendant makes a bald statement that "I am buying some land", the court has an obligation to give the defendant an opportunity to develop the subject. Further, it is of no little consequence to the appellate court's holding in *Cohen* that, when the subject was developed, it turned out that the defendant was, in fact, deeply in debt and did not hold title to the land.

court's judgment, an applicant for these public funds is not credible or is deliberately evasive about his own finances, the court is fully justified both in concluding that the applicant is hiding assets which would render him ineligible and in terminating the inquiry.

Both Chester and Rubinson were given ample opportunity to make a showing regarding their eligibility. Each is an intelligent, sophisticated businessman. The evidence at trial showed that they were wholly familiar with the world of finance. Judge Motley at one time, on their representations, conditionally agreed to appoint counsel for them, but on further inquiry decided they were not eligible. On the facts and circumstances of these cases, the extent and nature of her inquiry was more than "appropriate."

Further, it is clear that Judge Motley applied the proper standard in denying their applications. Beyond the phrase, "financially unable to obtain counsel," the Criminal Justice Act does not further define the standard of eligibility a trial judge should apply when deciding whether to appoint counsel; neither does the S.D.N.Y. Plan. It is fair to say that the drafters of the Act intended a flexible cut-off point somewhere above the status of a pauper.* What Congress itself contemplated is much

* The phrase "financially unable to obtain counsel" apparently originated in S. 1057, a bill which was drafted by The Attorney's General's Committee on Poverty and the Administration of Federal Criminal Justice (the Allen Committee) and which, after several unrelated amendments, was enacted into law on August 20, 1964. The Allen Committee clearly contemplated that the purpose of the language was to preclude a rigid standard. See excerpts from the Report of the Attorney General's Committee on Poverty and the Administration of Criminal Justice, Hearings Before the Senate Comm. on the Judiciary, 88th Cong., 1st Sess., pp. 183, *et seq.* (1963).

more open to question,* but the few cases which have dealt with the statutory standard have placed the line above "destitution" and "indigency." See, *e.g.*, *United States* v. *Kelly*, *supra*, 467 F.2d at 266; *Anaya* v. *Baker*, 427 F.2d 73, 74 (10th Cir. 1970); *Samuel* v. *United States*, 420 F.2d 371, 372 (5th Cir. 1969); *United States* v. *Cohen*, *supra*, 419 F.2d at 1127. None are, of course, controlling here,** but the Government accepts as a general

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* See, *e.g.*, the exchange during debate between Rep. Cahill and Rep. Moore, the draftsman of an identically phrased bill considered in the House of Representatives, 110 Cong. Rec. 447 (1964):

> "Mr. Cahill: . . . I am sure every Member of the House agrees with the principle stated by the gentleman that every defendant should have the right to competent counsel. But, I think any of us who have had any experience in the prosecution of criminal cases recognizes that most defendants who appear and who are asked whether or not they are able to pay for counsel, answer in the negative. Now, whose responsibility is it . . . to determine the financial responsibility of the defendant to pay counsel.
>
> Mr. Moore: . . . it is the responsibility of the district judge, after making proper inquiry of the defendant, if he is satisfied in response to the questions that he puts to the defendant that the defendant is impoverished and can not possibly provide his own counsel, then it is within the discretion of the court as to whether or not counsel shall be appointed.
>
> Mr. Cahill: As I understand the bill as written, there is a maximum payment of $500 that can be paid in any given case?
>
> Mr. Moore: That's correct.
>
> Mr. Cahill: Do I understand the gentlemen correctly that if the interrogation discloses that the defendant is capable of raising $500 that then counsel should not be appointed by the court?
>
> Mr. Moore: That is correct."

** *Anaya* concerns the interpretation of a New Mexico state statute; *Cohen* relies upon a provision in the District of Nebraska Plan which is not in the S.D.N.Y. Plan. Both *Cohen* and *Anaya* rely essentially on the rules of thumb provided in the Guidelines for the Administration of the Criminal Justice Act Issued by the Judicial Conference of the United States (1974).

proposition that the statutory provisions of the Criminal Justice Act were intended to extend the benefit of court-appointed counsel to persons living somewhere above the poverty line and should be applied when the cost of retaining counsel would deprive the defendant of the necessities of life *during the trial and the foreseeable future.** Where the poverty line is, and how far above it the Act should extend, may well vary greatly from district to district. But, in no district, we submit, did Congress intend that counsel was to be supplied to defendants to insure that they would continue to enjoy all the amenities of the lifestyles to which they had grown accustomed.

On the facts as presented or confirmed by the appellants themselves in this case, it would have been an abuse of the Act to provide counsel.** The facts with respect to

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* It is worthy of note, in this light, that the record is devoid of any factual showing by Chester or Rubinson of any efforts to actually retain a lawyer for cash, to work out an installment payment arrangement with a lawyer, to sell their assets or to borrow on their assets for the necessary funds. All the record contains are Chester's bald unsupported assertions that lawyers told him that it would cost $5000 a week (105a), or require a $10,000 retainer. (26a).

It might be argued that, if either Chester or Rubinson had managed to retain an experienced attorney for trial, through some future payment arrangement or by borrowing money, they would have had to relinquish this issue on appeal. That, however, is not so. If either had sincerely desired trial counsel and followed that course, he still could have argued in this Court that Judge Motley had misapplied the statute, and if this Court had agreed with him, the Criminal Justice Act could have been invoked to pay for his trial attorney.

** Appellants argue that Judge Motley was required to inquire on the record as to whether either could afford partial payment for the assistance of counsel. It is difficult to comprehend why the provision of the statute which provides for a bifurcated arrangement should be invoked when the trial judge has already

[Footnote continued on following page]

both appellants bespeak a continuing lifestyle which the public, through the Criminal Justice Act, was not obliged to augment.*

In sum, Judge Motley was permitted, as the fact finder, to include in the determination of financial ability, her assessment of the forthrightness of each appellant and of their motives for seeking court-appointed counsel. Further, it was her duty as a District Judge to remain alert to the possibility that an applicant for court-appointed counsel was engaging in a strategy to manipulate the right of counsel so as to interfere with the management of the trial and the administration of justice. See *United States* v. *Kelly, supra; cf. United States ex rel. Davis* v. *McMann, supra,* 386 F.2d at 618-19; *United States* v. *Llanes,* 374 F.2d 712, 717 (2d Cir.), *cert. denied,* 388 U.S. 917 (1967). All of these questions of fact, of motive and of credibility were peculiarly within her competence as the trial judge who managed the proceedings on a day-to-day basis. See, *e.g., United States* v. *Kelly, supra,* 467 F.2d at 266; *cf. United States* v. *Miley,* 513 F.2d 1191, 1201 (2d Cir. 1975). If, as the Government contends, Judge Motley's inquiries were "appropriate," her conclusions based on a proper standard of eligibility and supported by the record, then her rulings should not be disturbed. *United States* v. *Kelly, supra; cf. United*

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found that the defendant can pay the full cost of counsel. Clearly the partial payment provision is included in the statute to provide some protection for public funds, some halfway point, where the defendant who might otherwise be given a court-appointed attorney *carte blanche,* is obligated, as a condition of obtaining such counsel, to bear what burden of the costs he is able to bear. Congress did not intend the provisions of the Criminal Justice Act to apply, even in half measure, when the court finds the defendant is able to bear all of the costs.

* It seems clear that this was the policy Judge Motley was applying when she made her rulings. Certainly there is no evidence whatsoever that she applied an "indigency" standard.

States v. *Curiale*, 414 F.2d 744, 747-48 (2d Cir. 1969), *cert. denied*, 396 U.S. 959 (1970).*

POINT III

The Evidence of the Defendants' Guilt Was Overwhelming.

All defendants attack their convictions, claiming that the Government's evidence, particularly on the issue of criminal intent, was insufficient to support the verdict. Defendant Levine also argues, seeking reversal based on a claim of error in the rebuttal summation, that the case against him was close. An examination of the trial record reveals overwhelming direct evidence of guilt of Rubinson, Chester and Levine and clear, although circumstantial, proof against Reynolds.

A. The Government Established beyond a Reasonable Doubt that the Stern-Haskell Distribution Was Not Exempt From the Registration Requirements.

Defendants urge that the transactions in Stern-Haskell were exempt from the registration requirements of Section 5 of the Securities Act of 1933, 15 U.S.C. § 77e, because the Stern-Haskell shares were distributed to the public through a dividend declared by National Ventures. Whatever the merits of such an exemption might be in other circumstances, it is unavailable here, because the evidence established that the spin-off of Stern-Haskell shares by National Ventures was nothing more than a

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* In the unlikely event that this Court should find the record below inadequate, the proper procedure, we submit, would be to remand the matter to the trial judge for further inquiries and findings on the question of eligibility for appointed counsel. See *United States* v. *Kelly*, *supra*, 467 F.2d at 265 n. 6; *Wood* v. *United States*, *supra*, 387 F.2d at 354.

sham. Defendants Rubinson, Chester and Reynolds maneuvered several hundred thousand shares of Stern-Haskell stock through a series of meaningless transactions which accomplished, and were intended to accomplish, nothing except the distribution of the Stern-Haskell shares to the public without compliance with the registration requirements of the securities laws. This fact was established beyond any doubt by the proof of the attempt by Chester and Reynolds to distribute Mobile Home Ventures and the successful spin-off by Rubinson, Chester and Reynolds of Diston Industries.*

Defendants' reliance on Judge Mansfield's opinion in *SEC* v. *Harwyn Industries Corp.*, 326 F. Supp. 943 (S.D.N.Y. 1971) is entirely misplaced. First, it must be noted that Judge Mansfield concluded that the facts in *Harwyn* constituted a violation of the securities laws, although he denied the requested injunction on the ground that the defendants had relied in good faith on advice of counsel, 326 F. Supp. at 954-56, a defense which the jury quite properly rejected here. In addition, the facts of this case are considerably more aggravated than those in *Harwyn*. Although Judge Mansfield found that the primary motive for the *Harwyn* spin-offs was to create a public market for the stock of various subsidiary companies without going through the registration process, he did not find that the spin-off itself was a sham or that the underlying circumstances were fraudulent. The following are the key distinctions between the facts of *Harwyn* and the facts presented here: (1) Harwyn Industries, the dividend declaring corporation, was a company actively en-

* Rubinson's claim that Judge Motley erred in allowing the Government to prove the Mobile Home Ventures and Diston transactions is utterly without merit. Those transactions, contemporaneous with, and virtually identical to, that charged in the indictment were clearly admissible on the issue of defendants' unlawful intent. See, *e.g.*, *United States* v. *Crosby*, 294 F.2d 928, 946-47 (2d Cir. 1961), *cert. denied*, 368 U.S. 984 (1962).

gaged in business, whereas National Ventures was little more than a name with a fraudulently inflated stockholder list behind which the defendants acted as black-market underwriters; (2) Harwyn Industries had owned the stock in its subsidiary corporations which it distributed as dividends for several years prior to the distributions, whereas here the parent-subsidiary relationship between Stern-Haskell and National Ventures was a sham, created by a wash exchange of funds, for no purpose other than the creation of a public company by short-circuiting the registration requirements; (3) In the *Harwyn* case none of the principals sold any of their stock, whereas Chester, Rubinson, Stein, Feiffer, and Reynolds, acting through nominees and Levine, were the primary distributors of Stern-Haskell stock to the public.

Viewing as a whole the individual steps by which Stern-Haskell stock reached the public, it becomes clear that the defendants' transactions amounted to nothing more than an underwriting of Stern-Haskell stock without the protection of a registration statement. A fraudulent veil similar to that present here was pierced by Judge Wyatt in *United States* v. *McGuire*, 249 F. Supp. 43 (S.D. N.Y. 1965), *aff'd*, 381 F.2d 306 (2d Cir. 1967), *cert. denied*, 389 U.S. 1053 (1968). A scheme similar to that used here, but lacking elements of fraud, was also found to violate the securities laws in *SEC* v. *Datronics Engineers, Inc.*, 490 F.2d 250 (4th Cir. 1973), *cert. denied*, 416 U.S. 937 (1974).* See also *SEC* v. *Culpepper*, 270 F.2d 241 (2d Cir. 1959); *United States* v. *Custer Channel Wing Corp.*, 376 F.2d 675 (4th Cir.), *cert. denied*, 389 U.S. 850 (1967).

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* Reynolds' claim that his conviction was based on an *ex post facto* application of the securities laws is frivolous. The principles relied on in this prosecution, that fraudulent machinations designed to evade the registration requirements will be of no avail, long antedated this particular scheme. The SEC release of July 2, 1969 certainly did not have the effect changing the law. See 3 Loss, Securities Regulation 1894-99 (2d ed. 1961).

B. The Conspiracy.

The proof clearly established Rubinson's and Levine's membership in a conspiracy to sell unregistered and overpriced Stern-Haskell stock to the public through the use of an unlawfully rigged market.

It is surprising that Rubinson's counsel asserts a claim that the evidence against him was insufficient, since a stronger case than the one the Government presented against him is difficult to imagine. Weitzman, Hochen, Stein and Stern all testified that Rubinson was one of the organizers of the sham spin-off. Nordin's testimony also showed Rubinson's participation in the Stern-Haskell offering. Stein and Kaye both testified to Rubinson's participation in the payoffs to Levine; and Kravetz testified to Rubinson's offer to him of a similar payoff arrangement in connection with the marketing of Diston shares. (Tr. 4947-49). Stein also testified that Rubinson participated in setting up Chester's trip to New York to sell his shares to B'Noth Jerusalem so that they would not interfere with the controlled market. (797a-99a).

The jury also had a wealth of evidence from which it could find Rubinson's criminal intent. The most obvious proof of Rubinson's unlawful intent was the fact that he concealed his interest in the Stern-Haskell venture by using nominees, as testified to by Weitzman, Hochen and Stein. This fact was corroborated by the transfer records of both National Ventures (GX 20, 21, 22, 23) and Stern-Haskell (GX 24, 25, 26, 27) which showed that, despite his ubiquitous presence in the venture, no stock of either company was ever registered in his name. The tape recording made by Weitzman of a brief conversation with Rubinson concerning Diston (GX 70E) depicts Rubinson's guarded, cryptic language, highly unusual in a legitimate enterprise, but all too familiar to the criminal courts. Furthermore, the testi-

mony of both Weitzman and Kravetz of Rubinson's carrying around large quantities of stock certificates, rather than going through a broker in his own name, and his offering of a payoff to Kravetz to promote Diston shares provide clear indications of Rubinson's illicit intent.

Finally, Rubinson was present when attorney Irwin Germaise delivered his opinion letter warning that "a plan or scheme to utilize . . . shareholders as a conduit for distribution in evasion of the Registration requirements of the Act . . ." would not be exempt from the registration requirements. (GX 108, at 14).

The proof against Levine was likewise extremely powerful. Both Stein (749a-54a) and Kaye (1133a-34a) testified to an agreement whereby Levine would receive and make secret payments in return for activity in Stern-Haskell stock, and to delivery of such payments to Levine. (767a-68a, 1136a-38a). Stein also testified that he, Rubinson and Feiffer were in constant contact with Levine to coordinate their efforts to control the market. (761a-68a). This evidence was strongly corroborated. Jesse Sklar, another broker, testified that Levine guaranteed him against any loss in Stern-Haskell stock as an inducement for Sklar to sell the stock to his customers. (Tr. 484-85). The brokerage firm documents established that, as Ingrid Nelson of the SEC testified, Lockwood overwhelmingly dominated the trading in Stern-Haskell, appearing in the National Quotation Bureau pink sheets on 91% of the days Stern-Haskell was quoted (Tr. 5750) and trading 90% of the shares traded in the public market (Tr. 5758), including all but two purchases from the Feiffer accounts selling on behalf of Rubinson, Stein and Feiffer. (Tr. 5759). Nelson further testified, based on the documents, that Lockwood gave favored treatment to the Feiffer and B'Noth Jerusalem accounts when they traded in Stern-Haskell. When the Feiffer account sold Stern-Haskell stock, the price paid it by Lockwood was slightly higher than the price

Lockwood was paying for Stern-Haskell stock elsewhere. (Tr. 5761-64). When B'Noth Jerusalem bought stock from Lockwood, B'Noth Jerusalem got a lower price than Lockwood was charging other buyers. (Tr. 5765). In addition, while Levine was guaranteeing Sklar against, a loss in Stern-Haskell, Lockwood was constantly in a short position on Stern-Haskell stock (Tr. 5771), a fact consistent with Stein's testimony that Levine obtained buyers before he notified the co-defendants who controlled the Feiffer account that he should be "filled." (765a). Obviously to be short a stock like Stern-Haskell would be very risky unless Levine knew he had a ready source of stock in the Feiffer accounts.

The Government also established that Levine was the dominant force at Lockwood on trading matters generally, and certainly concerning Stern-Haskell, whether in his capacity as head trader or as the owner of the firm. (411a-12a, 774a). Besides Stein and Kaye, two other witnesses who dealt with Lockwood concerning Stern-Haskell, broker Jesse Sklar and trader Louis Abt, said they dealt with Levine on Stern-Haskell. (Tr. 484, 4531). In addition Gerald Mark, Levine's assistant, testified that Levine was in charge of Stern-Haskell trades at Lockwood. (Tr. 4715-18).

Levine also argues that no criminal intent was proved against him. (Levine Brief, at Point IV). This argument is frivolous. Certainly Levine's arrangement to receive and make secret cash payoffs and to participate in a scheme to control selling of Stern-Haskell stock involved a clear intent to defraud others who might trade in the stock. See *SEC* v. *Torr*, 15 F. Supp. 144 (S.D.N.Y. 1936), *rev'd on other grounds*, 87 F.2d 446 (2d Cir. 1937); *United States* v. *Kaufman*, 429 F.2d 240, 247 (2d Cir.), *cert. denied*, 400 U.S. 925 (1970). See also *SEC* v. *Capital Gains Research Bureau*, 375 U.S. 180, 198, 204 (1963).

Defendants also claim that the evidence established multiple conspiracies instead of the single conspiracy charged. They base this contention on a hypertechnical construction of the facts, designating each step of the securities marketing scheme as a separate conspiracy. This Court rejected such an approach to securities cases in *United States* v. *Crosby, supra*, 294 F.2d at 945. Here as in *Crosby*, the Government proved an integrated unlawful agreement with the fundamental purpose to sell overpriced and unregistered stock. Defendants' argument that the evidence here proved multiple conspiracies is based on the erroneous premise that the Government must show that each defendant participated in, or was aware of, each of the criminal objectives of a conspiracy. This view has repeatedly been rejected. *United States* v. *Frank*, 520 F.2d 1287, 1293 (2d Cir. 1975); *United States* v. *Dardi*, 330 F.2d 316, 327 (2d Cir.), *cert. denied*, 379 U.S. 845 (1964). See also *United States* v. *Kaufman, supra; United States* v. *Projansky*, 465 F.2d 123 (2d Cir.), *cert. denied*, 409 U.S. 1006 (1972).

But in any event, here the evidence showed all the convicted defendants' participation in, or awareness of, the entire scheme. Clearly Stein, Rubinson and Feiffer participated in all phases of the scheme. Whenever this conspiracy operated, except for the first days of National Ventures' existence, Rubinson, Stein and Feiffer were present. They were all participants in the early discussions with both Stern and Haskell; in the designation of nominees; in the custody of the stock in New York; in the payment of secret cash payoffs to Levine to stimulate demand; and in the regulation of selling to restrict supply.

Although Chester and Reynolds concentrated their attention on the spin-off, they obviously had an eye on the

price they would ultimately receive for the stock they were maneuvering to make salable. This fact was made explicit in Chester's case by his statements to Stack in the Mobile Home Ventures negotiations (Tr. 2997-3003) and to Fenton in the Diston negotiations (Tr. 4647-48) to the effect that he could arrange for the trading of those stocks after the spin-offs. It was also Chester who instructed Nordin to transfer the nominees' Stern-Haskell certificates into the name of Lockwood. (Tr. 682). Chester and Reynolds also participated in the market manipulation when they held their stock off the public market and sold it instead to B'Noth Jerusalem at less than half its market price. If they had been ordinary investors with no desire to assist in a stock manipulation, certainly they would have sold their stock through normal brokerage accounts, as they did do on a small scale through the accounts of Roberts and Reynolds. (GX 670).

Levine was, of course, more closely involved in the rigging of the market than in the spin-offs, but it would be all but incredible to conclude that he was unaware that Stern-Haskell had not registered this offering with the SEC and that no prospectus on Stern-Haskell existed, facts that undoubtedly were of great assistance to Levine in his efforts to manipulate the price of the stock. Indeed, Stein testified that he thought Levine had seen the Germaise opinion and insisted on another one (756a-57a) and that Levine insisted on buying the stock from a New York Stock Exchange firm, rather than directly from Stein, Rubinson and Feiffer.* (750a-51a).

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* Stein testified that, when Levine insisted on routing the stock through a New York Stock Exchange firm, they did not discuss the reason for this arrangement. (750a-51a). Later, Stein, Rubinson and Feiffer decided to route the stock through three firms instead of one to avoid giving the brokers the impression that they were selling a control block. (Tr. 3561-64). Although Stein's best recollection was that Levine was not present at that

[Footnote continued on following page]

This was not a case therefore in which the Government lumped several criminal episodes widely separated in time, and involving different parties, into one conspiracy, as was condemned in *United States* v. *Sperling*, 506 F.2d 1323 (2d Cir. 1974), *cert. denied*, 420 U.S. 962 (1975) and *United States* v. *Bertolotti*, Dkt. No. 75-1107 (2d Cir., November 10, 1975).*

C. Count Fourteen.

At the outset it is clear that the evidence showed the participation of Rubinson, Chester and Reynolds in the events charged in Count Fourteen, the transportation of unregistered shares** of Stern-Haskell stock from Florida to New York for the purpose of sale. Stein testified that he, Rubinson and Chester arranged this sale in response to Levine's complaints that sales from unknown

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discussion, the evidence was clear that Levine knew that Feiffer was selling the entire "box" of Stern-Haskell stock through the three New York Stock Exchange firms, and therefore that Feiffer was almost certainly a control person. (750a).

* Appellant Levine does not cite the case which appears to be most helpful to his cause, *United States* v. *Kelly*, 349 F.2d 720 (2d Cir.), *cert. denied*, 384 U.S. 947 (1966), in which the conviction of one defendant, Shuck, was reversed because his membership in a single overall securities fraud conspiracy was not fully established. *Id.* at 756. There, however, Shuck's role in the scheme proved at trial was considerably less vital to the overall venture —at least 750,000 shares were sold without Shuck's knowledge, *id.* at 756—than here where almost every share of Stern-Haskell stock sold to the public by the co-conspirators went through Levine. Moreover, in *Kelly*, Shuck was subjected to an "all-or-nothing" charge in which this Court found substantial unfair prejudice. *Id.* at 757-58. Finally, in *Kelly*, some of the most damaging evidence against Shuck consisted of post-conspiracy testimony of his co-defendants now clearly inadmissible under *Bruton* v. *United States*, 391 U.S. 123 (1968). No such proof was admitted here against Levine.

** Government Exhibits 41 and 42 consisted of the stock certificates, all in Reynolds name and endorsed by Reynolds.

sources were depressing the market (797a-99a). Chester and Reynolds stipulated to their presence at the sale of 18,750 shares of Stern-Haskell for $28,125 (Tr. 4873) which was also proved by the books and cancelled checks of B'Noth Jerusalem. (GX 211, 215, 215A). According to those records, as well as a stipulation with Reynolds (Tr. 5996), that sale occurred on Friday June 6, 1969. On the following Monday, June 9, 1969, Chester deposited $10,000 in his bank account, noting on the deposit ticket "loan from Ed Reynolds." (GX 150).

The evidence showing Rubinson's criminal intent has already been summarized above with reference to the conspiracy count and is equally applicable to this count as well.

The evidence against Chester was also extremely strong. He, of course, was the chief organizer of National Ventures and of the spin-off of Stern-Haskell stock. He was also present at the sale of stock to B'Noth Jerusalem in Brooklyn.

The only remaining issue, then, is Chester's state of mind which the evidence clearly showed to be criminal. Chester was aware of the use of nominees by Rubinson and Stein since he attended the February 8, 1969 meeting at which, both Hochen and Weitzman testified, nominees were designated. The evidence was also quite clear that Chester used his own nominees, including his former wife, Frances Roberts; his friend, Andrew McKay; and the defendant Reynolds. Nordin testified that he delivered to Chester the proceeds Roberts received for sales of Stern-Haskell stock. (Tr. 731-34). He also testified to indications of a nominee relationship between McKay and Chester. (Tr. 605-07); and Hochen testified that at the February 8th meeting it was said that McKay would be a nominee. (Tr. 2580). Reynolds' nominee relationship to Chester was corroborated by Chester's bank deposit

ticket dated June 9, 1969, showing that $10,000 from the sale to B'Noth Jerusalem of Stern-Haskell stock in Reynold's name went into Chester's bank account. (GX 150). The purpose of Chester's sale of Stern-Haskell shares through Reynolds and Roberts becomes crystal clear when considered in light of his admission that he knew any shares he owned were restricted. (Tr. 5993).

The evidence established beyond any doubt Chester's knowledge that the distribution of Stern-Haskell shares through National Ventures was not exempt from the registration requirements and was illegal. Besides Chester's admission that he knew that he was a control person and could not lawfully sell any Stern-Haskell stock on the public market, the Government proved that Chester received the admonition in the Irwin Germaise letter.* In addition, Chester received another strong and clear warning both orally and in writing from Washington attorney Marc White who wrote to Chester that what he was doing with National Ventures complied the registration requirements only "if the overall plan behind the transaction was not developed to avoid registration with the Commission and was not a device to put large blocks of unregistered stock in the hands of the public who have inadequate information about the company." (GX 120). If there was any doubt at all about Chester's criminal intent after he went ahead with the Stern-Haskell spin-off despite the Germaise letter, that doubt evaporated when Chester entered into the Diston transaction on June 2, 1969 and sold the Stern-Haskell stock in New York on June 6, 1969 after speaking to Marc White and receiving his opinion letter dated May 16, 1969.

The Government also produced ample evidence of Chester's intent not only to break the law but also

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* The letter was addressed to Chester, and he gave a copy (GX 121B) of it to Bosh Stack. (Tr. 2945).

fraudulently to create an appearance of lawfulness about his spin-off transactions. The following are only a few of the fraudulent features of Chester's machinations: (1) his use of land which he did not even own to create the appearance that National Ventures engaged in a legitimate business; (2) his creation of Stock Transfer Agency which he anonymously controlled through Nordin and his forging of Nordin's signature on the verification to Germaise that National Ventures had over 600 stockholders (GX 108); (3) his artificial expansion of the number of shareholders of National Ventures by giving away small numbers of shares to various people; and (4) his using wash transactions to create the appearance that National Ventures had purchased shares of Stern-Haskell, Mobile Home Ventures and Diston when in fact no money changed hands. This evidence—and Chester's failure to inform the Germaise and White of these aspects of his plan—leaves no doubt that Chester knew that the spin-off scheme was not exempt from the registration requirements and that the distribution of Stern-Haskell stock, particularly the transportation and sale of June 6, 1969 charged in Count 14, violated the law.

The jury was also justified in finding that Reynolds knowingly participated in the unlawful transportation and sale charged in Count 14. Reynolds guilt was established primarily on the basis of his participation with Chester in an arrangement to aid and abet Chester in the sale of unregistered Stern-Haskell stock. The evidence established that Reynolds and Chester had set up National Ventures so that Chester would obviously be a control person of National Ventures as its President and major stockholder. Chester was therefore clearly unable to sell his National Ventures or Stern-Haskell stock. Reynolds and Chester also agreed that Reynolds would not be a control person of National Ventures and consequently Reynolds had no National Ventures stock in

his name and relinquished his position as vice-president of the company after its name was changed to National Ventures. This understanding was established by Nordin's testimony that Chester and Reynolds agreed that Reynolds would get a portion of the successor company to Toy King * (Tr. 572) and the stock transfer records of National Ventures (GX 23), which showed that Reynolds owned no National Ventures stock, although he had owned 123,000 shares of Toy King. (Tr. 1048).

The evidence was clear, however, that Chester and Reynolds evaded the restriction against Chester's selling any Stern-Haskell stock by simply selling stock in Reynolds' name and dividing the profits. In June after Rubinson and Stein told Chester (in response to Levine's complaints) to stop selling Stern-Haskell stock on the public market but that (in response to Chester's insistence that he had to sell stock because he needed the money) an arrangement could be made to sell some of it in New York, Chester and Reynolds came to New York to sell Stern-Haskell stock in Reynolds' name, the stock having been transferred from the name of McKay. (GX 27). A deposit slip showed that at least $10,000 of the proceeds of that sale went into Chester's bank account. (GX 150).

The jury was entitled to infer criminality from this transaction not only from the nominee relationship between Chester and Reynolds, but also from Reynolds' failure to sell "his" stock in the ordinary course of business on the open market ** where Stern-Haskell was then selling at between 3 7/8 and 4 3/8, over double the price paid by B'Noth Jerusalem. (GX 670).

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* Nordin testified that Chester said a shell would cost $25,000. (Tr. 754). Bosh Stack said Chester offered to sell National Ventures for $50,000. (Tr. 3019).

**Reynolds had previously sold 1200 shares of Stern-Haskell through A. G. Edwards & Co. (GX 133, 134; Tr. 3110-13) and deposited the proceeds in a new account he opened at Boulevard National Bank in Miami, the same bank Chester used. (GX 151, 152; Tr. 3157-58).

The Government also established that Reynolds engineered Marinus Laboratories' disposition of its National Ventures and Stern-Haskell stock to co-conspirators. The evidence showed that in January 1969 Reynolds transferred 5000 shares of Marinus' National Ventures stock to Feiffer (GX 23) and that in April or May, 1969 Reynolds arranged a sale by Marinus of 10,000 shares of Stern-Haskell for $15,000 to Feiffer or B'Noth Jerusalem. (GX 27).* Nordin testified that Reynolds told him that the controlled Marinus (Tr. 571), and Charles Cairnes's testimony established that Reynolds was a strong force at Marinus and that Reynolds handled Marinus' Stern-Haskell transactions.** The Government's position

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* Cairnes testified, based on Marinus' correspondence (Reynolds' Exhbit K), that the sale was to Feiffer (Tr. 6213-18) but the stock transfer records show the stock was transferred to B'Noth Jerusalem. (GX 27).

** Cairnes admitted that Reynolds was an officer and director of Marinus and each of its subsidiaries and, with a little prompting from the appropriate documents, that Reynolds had authority to sign Marinus' checks. He also said that Reynolds was the company's financial advisor and that Reynolds had handled Marinus' sale of Stern-Haskell stock to Feiffer for $15,000 and that he, through a personal trust, had also owned some Stern-Haskell stock. The jury may have disbelieved Cairnes' claim that Marinus had obtained its National Ventures or Toy King stock—Cairnes said Toy King at the trial but National Ventures in the Grand Jury—as a result of an interest free loan he had made to Reynolds. At the trial Cairnes testified that the loan was between $5,000 and $10,000 dollars, whereas he had told the Grand Jury that the amount was between $10,000 and $15,000. (Tr. 6303-04). Although Cairnes had correspondence and bank documents indicating that the proceeds of the sale of Stern-Haskell stock to Feiffer had gone into another small company, in fact, that company, presumably along with the $15,000, was later acquired by Marinus of which Reynolds was a director and officer. In any event, whatever the precise arrangement Reynolds had with Cairnes or Marinus, it was clear that Reynolds had an interest in Marinus' profits on National Ventures and Stern-Haskell shares and any other stocks which National Ventures might "spin" in its direction.

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that Reynolds and Chester were working in tandem found further support in Hochen's waiver of his rights in Mobile Home Ventures' shares. After Hochen agreed with Chester to waive his rights in return for $187.50, Hochen sent a letter to Reynolds (GX 92A, 92B) virtually identical to letters from Feiffer and Weitzman to Nordin. (GX 64). A few days later Hochen received Reynolds' check. (GX 93). Hochen never discussed the matter with Reynolds. (Tr. 2617).

POINT IV

Weitzman's Remarks About Rubinson's Perjury Conviction Did Not Deprive Rubinson of a Fair Trial.

On February 7, 1975, about two weeks into this eight-week trial, Saul Weitzman, a Government witness, faced Rubinson on cross-examination. Rubinson, attempting to elicit from Weitzman his motive for testifying against Rubinson, asked him "why" he had kept certain documents Rubinson had inadvertently left in his office.* After prodding from Rubinson, Weitzman responded:

> "A. There came a time when I started to accumulate information against you, Mr. Stein and Mr. Feiffer for certain damages and harm that were very extreme to myself, my family, my finances and my business, to the point where I was

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Although Cairnes said that Chester had never acted as counsel for Marinus, the Government introduced a draft letter (GX 61) in Chester's handwriting setting up a sale by Marinus to Investment Bancshares, a corporation controlled by Stein (Tr. 3529), of 15,000 shares of Stern-Haskell stock. Weitzman testified that Rubinson had left the draft letter in Weitzman's office. (Tr. 1599-1600).

* These documents were turned over to the SEC by Weitzman and were Government Exhibits in this trial. (GX 61, 61A).

being destroyed and I had to start protecting myself, I had to get all the facts so that I could present it to the proper authorities, to clear myself, to not put me into the same category as being a criminal, the same as you and Stein and Feiffer are.

Q. Oh, thank you. A. I am not a convicted perjurer like you are.

Q. Thank you. A. Right." (Tr. 1662-64).

Weitzman and Rubinson apparently oblivious to the motions for mistrial from two defense attorneys continued:

"A. May I continue?

Q. No, I want to ask you a question. You brought up perjury—A. I didn't finish. You asked me a question. I didn't finish. I have never been in jail.

Q. You mean I was in jail? A. To the best of my knowledge, yes.

Q. Tell the jury—"

The court then interceded: "Do you want to pursue that?" Rubinson indicated he did not and made a characteristic speech:

"He made me, in front of this jury right now, to show his venom, he said that I was a convicted perjurer, and that I was in jail. I cannot get a fair trial here, and I immediately request a severance on those grounds." (Tr. 1664).

Weitzman's remarks were unfortunate, without doubt.*

* There is no allegation or indication that the representatives of the Government were any less surprised by this turn of events than the other persons in the courtroom.

But they did not occur in a vacuum. In the context of this trial, which Judge Motley aptly termed "a circus," * Rubinson suffered no unfair prejudice from this exchange.

If Rubinson had taken the witness stand, of course, the 1972 perjury conviction could have been used to impeach his testimony. He did not take the stand. But his irrepressible penchant, throughout the trial, for testimonial repartee with witnesses, court and counsel in the presence of the jury, was tantamount to his ascension to the stand.** The critical difference was that by testifying on his feet as opposed to on the stand he successfully avoided swearing to any of his factual assertions.***

On the peculiar facts of this case, then, the perjury conviction was entirely probative of Rubinson's credibility and was evidence which, we submit, the jury was entitled to hear. Any right that Rubinson may have had not to take the witness stand and to thereby avoid placing his credibility in issue was waived by his persistent "testimony" throughout the trial in the face of repeated admonitions by the trial judge to cease and desist. *United States* v. *Kaufman*, *supra*, 429 F.2d at 246; *Redfield* v. *United States*, 315 F.2d 76, 80 (9th Cir. 1963); *cf. United States* v. *Lepiscopo*, 429 F.2d 258, 260 (5th Cir.), *cert. denied*, 400 U.S. 948 (1970); *United States ex rel. Miller* v. *Follette*, 397 F.2d 363 (2d Cir. 1968), *cert. denied*, 393 U.S. 1039 (1969).****

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* See p. 48, *supra*.

** Rubinson's summation, alone, put his entire defense, complete with factual assertions not in evidence before the jury (Tr. 6680-6704). See p. 43, *supra*.

*** It is noteworthy that this tactic is precisely that which Rubinson had indicated he learned from his friends at the halfway house and might put into practice at this trial. See p. 40, *supra*.

**** It should be noted that to the extent *United States* v. *Curtis*, 330 F.2d 278 (2d Cir. 1964), bears on this issue it is clearly dis-

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Moreover, as the trial judge held, Rubinson opened the door to Weitzman's response. She found, *inter alia*:*

> "Your defense was and you pursued it, that this witness had a motive to testify against you, that he disliked you, he had a lot of reasons to be against you, and you wanted to bring all that out, which he did, so you brought this on yourself." (Tr. 1668).
>
> * * * * *
>
> "It is all right for you to bring it out, but he brought this out pursuant to your design to show that he has a lot of reason to be against you, and he certainly has brought it out." (Tr. 1669).

Substantial facts and circumstances support Judge Motley's finding. It is clear that Rubinson did indeed set out to elicit Weitzman's motives for testifying. In an offer of proof before the jury prior to Weitzman's thrust, Rubinson had announced in his customary testimonial fashion:

> "It's relevant to show his motive in sitting up there as trying to testify against me and destroy my life.

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tinguishable. In Curtis, the court found that the *pro se* defendant had not waived his right to counsel in the first place, and thus found that his testimonial summation did not constitute a waiver of any Fifth Amendment rights. Further, it would appear that *Curtis* may have been eroded by this Court's clear recognition of the "thorny problems raised by a *pro se* defendant who repeatedly engages in improper conduct." *United States ex rel. Miller* v. *Follette, supra,* 397 F.2d at 365.

* The trial judge also said with respect to this issue:

"The Court's ruling is that you can't get a mistrial as a result of a question which you put to the witness as to what his motives were for testifying against you, so your motion is denied. . . ." (Tr. 1666).

* * * * *

"And that was your strategy to have this man bring out a lot of reasons for his being against you and as a result of that he brought that out. . . . You asked the question which brought it out . . . a question which you could have foreseen that he might say something like that." (Tr. 1675).

> I am coming to loans that he never paid back that I had to pay back for big sums of money." (Tr. 1641).

It was also evident, as these ex-business partners faced each other in court that the feelings of great antagonism were mutual.* Thus, Rubinson should have been able to anticipate, better than anyone, the lengths to which Weitzman would go in response to his questioning about motives.

Certainly, if Rubinson did not deliberately goad Weitzman into overkill, it could not have been done more effectively if he had planned it, and there were indications that he had, indeed, planned it. After Weitzman first brought out the perjury conviction, instead of avoiding the subject, Rubinson returned to it again and again. He literally asked the same question that had precipitated the initial response: "... Why?" (Tr. 1692-93). And once again Weitzman responded with a litany of the woes Rubinson had caused him (Tr. 1693-95), and continued until interrupted by the court. A third time, Weitzman commenced again, but this time the court cut him short and struck the answers on Rubinson's motion. (Tr. 1712-13). In other words, Rubinson effectively got the witness to demonstrate that he would seize any opportunity to get back at Rubinson. Whether Rubinson started out to do this, or to create appellate issues or just chaos, it is more than just arguable that his baiting of Weitzman was, in fact, part of his overall strategy.**

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* Predictably, Rubinson did not fail to get his side of the story to the jury:

> "If he had a gun he would shoot me now. He has harassed me for five years and put me in jail twice and now he is going after me the third time. . . ." (Tr. 1700).

** Given his prior conduct at trial, the Judge concluded that he had deliberately opened himself to attack by Weitzman. The prior conduct she had reference to was not only his day-to-day

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Even assuming there was no basis supporting the admissibility of Weitzman's remarks concerning Rubinson's perjury conviction, it did not create the kind of prejudice which denied Rubinson a fair trial. Plainly, these few intense minutes during the first week in February did not dominate or permeate this eight-week trial. As Judge Motley said with respect to Weitzman's remarks when the case was about to go to the jury on March 20, 1975: "So much has happened in this case . . . [i]t would probably be prejudicial to go over it now, because they have probably forgotten it." (Tr. 6710-11). The Judge's remark was occasioned by the Government's reminder to her that Rubinson might be entitled to a charge instructing the jury as to the perjury conviction. Rubinson and everyone else at the defense table were silent on the proposition. Similarly, neither Rubinson nor any defense counsel had asked the Judge for an instruction to the jury at the time of the incident.*

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behavior, but, in particular, his handling of Sten Nordin, a Government witness. Rubinson's cross-examination of Nordin can only be termed a disjointed, vicious, and wholly improper attack. He called Nordin a crook and a liar and a number of other things. He postured in front of the jury about the denial of counsel for himself (Tr. 756-64, 792-93). Later the court, however, permitted him to come back and question Nordin further and Rubinson conducted an acceptable examination of the witness. (Tr. 1205-14). Clearly, Rubinson was capable of playing both roles and throughout the trial used whichever the situation called for.

Pertinent here is the trial judge's finding that Rubinson's application for appointed counsel and his conduct at trial was part of an overall strategy to disrupt the trial and create appellate issues. See p. 39, *supra*. In that light, his renewal of his application for counsel in the midst of this Weitzman incident may also be more than it appears to be on the surface (Tr. 1674-75).

* Rubinson's request for a side bar conference can in no way be construed, even in light of his *pro se* status, as a request for an instruction. Rubinson demonstrated later in the cross-examination that, if he objected to an answer, he knew how to deal with it

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Finally, it must be noted that Judge Motley stated:

> "the evidence against him [Rubinson] is not slight evidence, or anything of the kind, which would lead to the conclusion that that remark was so prejudicial as to prevent him from securing a fair trial." (Tr. 6710).

She repeated this finding in her opinion on post-trial motions. (2059a-60a). Given the Judge's finding that the evidence was overwhelming as to Rubinson and the fact that the trial was long and eventful, it is plain that this unexpected, brief salvo by Weitzman concerning Rubinson's perjury conviction was not so prejudicial as to require reversal. See, *e.g.*, *United States* v. *Maxwell*, 383 F.2d 437 (2d Cir. 1967), *cert. denied*, 389 U.S. 1057 (1968); *United States* v. *Gillette*, 383 F.2d 843 (2d Cir. 1967). See also *Bates* v. *Nelson*, 485 F.2d 90 (9th Cir. 1973), *cert. denied*, 415 U.S. 960 (1974); *United States* v. *Carter*, 448 F.2d 1245 (8th Cir. 1971), *cert. denied*, 405 U.S. 929 (1972). In the context of this trial it cannot be said to have contributed to Rubinson's conviction, and if it was error, it was harmless. See, *e.g.*, *Harrington* v. *California*, 395 U.S. 250 (1969); *United States* v. *Chason*,

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when he asked the judge to strike certain of Weitzman's responses. But this time all he said was:

> "I cannot proceed unless I speak to you in private about this, to explain to the jury about this case. . . ." (Tr. 1665).

It is crystal clear from the record that what Rubinson wanted the Judge to do was to tell the jury all the background facts about the perjury conviction, as Rubinson later explained:

> "He said I was convicted of perjury and [at the time] I was not. And he said I went to jail, and that was five years later. I went to jail for six months. And here I am today, because of this man with his venom, and I'm trying to bring out that he tried to kill Mr. Stein, and he blames me. This man is deranged. I'm going to come to the psychiatric aspects soon, that he had a psychiatrist, he wanted to kill himself. I saved him. I'm trying to bring all these things out." (Tr. 1668) (See also Tr. 1675).

451 F.2d 301, 305 (2d Cir. 1971), *cert. denied*, 405 U.S. 1016 (1972); *Rule* 52(a) of the Federal Rules of Criminal Procedure.*

POINT V

The Communication Between Defendant Haskell And The Forelady Of The July Did Not Prejudice Rubinson And Is Not Grounds For Reversal.

Defendant Rubinson contends that a conversation which took place during the trial between defendant Haskell and the forelady of the jury so prejudiced his case that his conviction must be reversed. (Rubinson's Brief at 79-83). This claim is utterly frivolous.

In contravention of the express orders of the court, the defendant Haskell had a brief conversation with the forelady of the jury. The nature, length and content of the conversation was brought to the attention of the court by the Government and the possible prejudicial aspects of the conversation were developed by the Government in a conference with court and counsel. (1001a-05a). The

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* It is perhaps worth noting that neither this specific incident nor Rubinson's conduct of the trial in general, see pp. 42-43, *supra*, was such that any other defendants were fatally prejudiced as Chester claims. Judge Motley held that:

> "I am not going to grant a mistrial for anyone else for something this defendant did deliberately, and the record will disclose his conduct, which was similar to the witness making remarks." (Tr. 1669).

Her ruling is supported by *United States* v. *Bentvena*, 319 F.2d 916 (2d Cir.), *cert. denied*, 375 U.S. 940 (1963), where this Court held that, if the prosecution did not provoke the incident as it did not here, and if the trial judge did all in her power to minimize the effect, as was the case here, no grounds for reversal was available for co-defendants of difficult defendants. "Any other answer," this Court said, "would produce little less than anarchy." *Id.* at 931.

incident involved a reference to Watergate, some remarks on the trial generally, and a comment by Haskell to the effect that only he had lost money on the transaction while everyone else made money. (996a-97a).

Communications between a defendant and a juror during the course of a trial are, of course, not to be condoned. Such communications have an obvious potentiality for prejudicing one party or another. Accordingly, the courts have long recognized that such private communications are to be deemed presumptively prejudicial. *Remmer* v. *United States*, 347 U.S. 227 (1954). But the inquiry does not end with the presumption. In *Remmer*, the Court instructed trial judges on the handling of such incidents:

> "The trial court . . . should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate." 347 U.S. at 229-30.

That is precisely what the court did in the present case. The one witness and the two participants in the conversation were questioned; the juror's ability to continue to judge the case fairly and impartially and the impact of the conversation on her were developed (1010a-14a); and while counsel were absent from the interview with the juror at their suggestion (1006a), the interview was later read to them by the reporter. (1014a).

Throughout this entire incident there was not the slightest suggestion from any defense counsel of any prejudice. (995a-1017a). Rubinson was even informed by the Assistant United States Attorney of possible lines of prejudice, and he had the advantage of the comments and reactions of the numerous experienced defense counsel who were equally faced with the question of whether or not there had been prejudice to their clients. (1002a,

1004a-05a, 1008a). This was, morever, an issue on which a layman was surely as good a judge as a lawyer—would the juror have any prejudice against Rubinson because of the conversation?

Rubinson's silence below is explained by the obvious fact that he did not believe that he would be prejudiced. It is not after all a crime to make money, it is only a crime to make it illegally, and Haskell's remark was certainly not aimed at suggesting that the transactions were criminal. Since making money was the only aspect of the conversation touching Rubinson, he undoubtedly reached the common-sense conclusion that the entire incident was harmless as far as he was concerned, particularly in light of the juror's statement that she could act fairly and impartially. The reasonableness of this analysis is borne out by the fact that all the defendants other than Haskell were equally affected by this conversation and none of them suggested that there was prejudice to their cases. Moreover, the acquittal of three defendants shows that this conversation did not taint the entire trial.

In order to have a mistrial declared or a conviction reversed, a defendant must show that he was deprived of an objective and disinterested juror. *United States* v. *Dennis*, 183 F.2d 201 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951); *United States ex rel Moore* v. *Fay*, 238 F. Supp. 1005 (S.D.N.Y. 1965). Nothing in the colloquy between the juror and the court below suggested that such an argument could succeed. Rubinson made a practical and reasonable decision at trial, and there is no ground for allowing his newly contrived arguments to prevail over his practical and tactical judgment below. See *United States* v. *Gersh*, 328 F.2d 460 (2d Cir.), *cert. denied*, 377 U.S. 992 (1964).

POINT VI

The Court Ruled Correctly in Excluding Testimony on Domestic Legal Opinion.

Defendant Reynold contends that his conviction should be reversed on the ground that he was barred from eliciting an expert opinion on the law regarding registration statements applicable to spin-offs in 1969. (Reynolds' Brief at 47 *et seq.*). Reynolds makes it clear that he did not wish to question the witness on the state of mind of Chester, the permissible line of inquiry for which the witness was offered, but sought to elicit the witness' legal opinion as an expert. The defendant argues for a destructive change in the legal system for which he offers neither precedent nor persuasive logic. This contention is meritless.

It is a long-standing rule that opinion testimony on domestic legal issues is excludable. 7 Wigmore, Evidence § 1952 (1940 ed.); *Myres* v. *United States*, 174 F.2d 329 (8th Cir.), *cert. denied*, 338 U.S. 849 (1949); *State* v. *Ballard*, 394 S.W. 2d 336 (Mo. 1965); see *United States* v. *Phillips*, 478 F.2d 743 (5th Cir. 1973).* This rule applies equally, of course, to the Government and to the defense.**

The reason for the exclusion of expert testimony on domestic law is that it is superfluous to the opinion of the court which ultimately rules on the legal issues at trial. If the defendants believed that the law in 1969

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* The exclusion of legal opinion is also permissible under the judge's discretionary power to control the conduct of a trial. *Myres* v. *United States*, *supra*, 174 F.2d at 335.

** In *Huff* v. *United States*, 273 F.2d 56 (5th Cir. 1959), the Government offered a witness on a technical aspect of customs law and the admission of that testimony necessitated reversal by the appellate court.

was such that their actions were not illegal or criminal, then the proper course would have been for them to move the court to quash the indictment or for a verdict of acquittal and in that context to argue the legal issue, citing whatever authority supported their position. Alternatively, the defense should have pressed its view in it requests to charge. But it was improper to attempt to usurp the role of the court by turning an issue of law into an issue of fact and inviting the jury to choose between the instructions of the court and whatever contrary "expert" opinion it might be possible to elicit from the witness stand.

It is unquestionably true that the securities laws are complex and intricate, but that provides no basis for an exception to the law. The same could have been said of the customs laws which were relevant in the *Huff* case or of the Internal Revenue Code and Treasury Regulations which were crucial in *Myres*. If the tactic of eliciting legal opinions were allowed, jury trials would become chaotic. The authority of the court would be destroyed. The jury would be bewildered and forced to make findings on the law by choosing among expert legal opinions.

POINT VII

The Court Did Not Abuse Its Discretion in Limiting the Length of Cross-examination or Recross-examination.

Defendants Rubinson and Reynolds argue that their convictions should be reversed because of time limitations which the trial judge imposed on cross-examination, recross-examination and summation. (Rubinson's Brief at 63-71; Reynolds' Brief at 20-35). They further argue that the court's refusal to allow recross of the witness Marc White was reversible error. (Rubinson's Brief at

71; Reynolds' Brief at 54-55). Defendant Levine adopts Rubinson's arguments on these issues and, in turn, defendant Chester adopts the arguments of Rubinson and Levine. (Levine's Brief at 49; Chester's Brief at 8-9). These arguments lack merit.

It is a sound and established axiom of the law that the trial judge has extensive discretion in controlling the scope and length of direct examination, cross-examination, recross-examination and summation. *United States* v. *Kaufman, supra; United States* v. *Pruitt*, 487 F.2d 1241 (8th Cir. 1973). The defendant has a constitutional right to confront the witnesses against him, and that right includes cross-examination of witnesses. The defendant does not, however, have any right to engage in repetitious questioning, *United States* v. *Pacelli*, 491 F.2d 1108 (2d Cir. 1974), *cert. denied*, 419 U.S. 826 (1974); *see United States* v. *Jorgenson*, 451 F.2d 516 (10th Cir. 1971), *cert. denied*, 405 U.S. 922 (1972), nor may he introduce collateral issues at will, *United States* v. *Dorfman*, 470 F.2d 246 (2d Cir. 1972), *cert. dismissed*, 411 U.S. 923 (1973); *United States* v. *Pacelli, supra*, to cite only two common and obvious forms of abuse. It is for the trial judge to draw the line between fair and thorough cross-examination and those abuses of the trial process which require that limitations on examination be imposed. The exercise of that discretion should not be second-guessed unless the appellate court is convinced that the ruling of the trial judge resulted in prejudice. *United States* v. *Jackson*, 482 F.2d 1167 (10th Cir. 1973), *cert. denied*, 414 U.S. 1159 (1974); *United States* v. *Kaufman, supra*. In the case at bar, Judge Motley's rulings were clearly a proper exercise of discretion.

Defendants Rubinson and Reynolds make much of the manner in which Judge Motley sought to control the course of a trial which was not only lengthy and complex but which also had eight defendants and seven de-

fense counsel, two of whom were appearing *pro se*. A trial of this sort is obviously rife with opportunities for repetitious cross-examination and for the introduction of extraneous issues when the examination turns to matters outside the facts of the present case, as, for instance, in the quizzing of Sidney Stein by Reynolds' counsel on an utterly unrelated murder case in Tennessee. (Tr. 4043). At the conclusion of the trial, Judge Motley discussed the problems she had faced:

> "This is not a usual and normal case or a short case where lawyers and defendants were under control at all times. This was a case where the Court was required to restrict cross-examination lest we be here until the Christmas after next, it was required repeatedly to tell lawyers not to shout, not to talk while the Court was talking and not to disobey Court orders." (Tr. 7309).

This situation demanded a method of control. Judge Motley's method of announcing in advance the time which the defense would have for cross- and recross-examination was entirely fair and reasonable.

There were obvious advantages to all parties when they were advised that they would be given a set number of hours for cross-examination and recross-examination. The defense knew that it had two or two and a half days of cross-examination on the major witnesses—obviously a period which allowed for full and searching cross-examination. Within those wide limits the defense could organize and direct its efforts, dividing the lines of inquiry to be pursued. Each defendant knew that he would have time with the witness. With major witnesses, the first defense attorneys could not so monopolize the field that the later counsel would be precluded from all effective examination with the continuous admonition

that the points had previously been covered. Further, the time limits insured that, while counsel still had other lines of inquiry they wished to pursue, they would not be cut off entirely when the Judge decided that the testimony was exhausted. This was surely a far better method of controlling unnecessary and redundant cross-examination than that often utilized by trial judges, *i.e.*, informing defense counsel in the midst of their cross-examination that they have exhausted all lines of attack and ought to be seated.

Neither Rubinson, Reynolds, Levine nor Chester has been able to cite to this Court cases in which time limits on cross and recross-examination have led to reversal in the appellate courts. In fact, the practice of setting such limits is broadly commended by no less an authority than Wigmore:

> "The *length of time* occupied in questioning may of course fitly be the subject of reasonable limits, fixed beforehand if possible, and a mutual agreement as to time is often made." 3 Wigmore, Evidence § 783 (1970 ed.) (emphasis in original, footnote omitted).

Most basically, the shrill objections of the defendants misconstrue the true injury. The question is not whether limits were set on cross-examination—judges do that constantly and properly by one means or another — but instead whether the defense was precluded from effective examination into legitimate areas of cross-examination. It is being cut off from such reasonable questioning that is prejudicial to the defendant, not the fact that some limit on questioning has been imposed. *United States* v. *Kahn*, 472 F.2d 272 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973); *United States* v. *Jackson*, *supra*.

The classic cases of impermissible limitations on cross-examination are, of course, those in which the defense is prevented altogether from inquiring into basic issues which set the witness in the appropriate context. *Smith* v. *Illinois*, 390 U.S. 129 (1968); *Alford* v. *United States*, 282 U.S. 687 (1931). Nothing of that sort took place here. In fact, it is notable that, in Rubinson's lengthy exegesis on the unfairness to him of the trial judge's ruling, he alleges only one specific instance of prejudice, the refusal to allow recross-examination of Marc White, a minor Government witness. (Rubinson's Brief at 63-71).* Recross-examination of White was denied by the trial judge on the grounds that no new area had been gone into on redirect. (Tr. 3107). Redirect went solely to the question of how the witness was sure of what the defendant Chester had told him, an area fully covered on direct and cross. (Tr. 3099-3101). In that event, there was no right to recross-examination and no prejudice flowed from its denial. *Turner* v. *United States*, 441 F.2d 736 (5th Cir. 1971); *Hale* v. *United States*, 435 F.2d 737 (5th Cir. 1970), *cert. denied*, 402 U.S. 976 (1971); *United States* v. *Morris*, 485 F.2d 1385 (5th Cir. 1973).

In arguing with regard to the limitations placed on cross-examination, Reynolds also virtually concedes the crucial point that he was not prevented from reaching significant areas of cross-examination. With Stein, his prime example, Reynolds states that the problem is *not* that most of Stein's prior conduct was not examined. (Reynolds' Brief at 26-27). Reynolds is reduced to arguing that Stein answered questions in a way which was both evasive and deliberately time-consuming. But even the examples pointed to in his brief show the weakness of this attack. For instance, Reynolds chooses to reprint a colloquy concerning the denial of certiorari in the

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* Reynolds also claims prejudice from this ruling. (Reynolds' Brief at 54-55).

Buckeye case, complaining of Stein's evasiveness and stalling tactics. We submit that the tedious nature of the questioning, disclosed by a reading of that exchange, lies as much with the defense counsel as with the witness.

While Reynolds seeks to make much of how his cross-examination of Stein was hampered by Judge Motley's ruling, he fails to describe fairly how the court offered and gave him the additional time he requested to cross-examine him:

> "The Court: Mr. Keegan, did you have something else you wanted to go into?
>
> Mr. Keegan: Yes, I would like to explore with him his use of B'Noth Jerusalem as a nominee... B'Noth Jerusalem and his participation in the Dioguardi trial, Imperial Investment and Mr. Philip Kaye's involvement in that second trial.
>
> I think there is a little more to it than we have heard.
>
> The Court: What is that, because I want to know how much more time to give you.
>
> Mr. Keegan: Fifteen, twenty minutes the most.
>
> The Court: All right." (Tr. 4261).

Contrary to Reynolds' argument, an attorney champing at the bit for further cross-examination may fairly be asked to tell the court what he will examine on. Here counsel also had the advantage of a weekend recess in which to prepare his questions. The following Monday, Reynolds' counsel undertook his further cross-examination. (Tr. 4288-98). When the trial judge halted that additional cross-examination, she remarked not only that counsel's time was up but also:

> "You are going over things you went over the other day when you cross-examined this witness." (Tr. 4298).

Repetitious cross-examination may, of course, be brought to a halt. *United States* v. *DeMarco*, 488 F.2d 828, 831 (2d Cir. 1973); *United States* v. *Zane*, 495 F.2d 683, 695 (2d Cir.), *cert. denied*, 419 U.S. 895 (1974). Counsel then concluded with a few additional questions and sat down, stating that he had further questions but that his time was up. Reynolds contends that this additional cross-examination was inadequate. (Reynolds' Brief 33-34). But Reynolds was given the time he asked for and made no further offer of proof with respect to issues he wished to pursue. The record reflects that Judge Motley did not abide by cast iron time requirements. With respect to an important witness such as Stein the additional time requested was granted; and when the examination was ultimately concluded, it was done so not only on the ground of time, but also of repetitious questioning. This is not, therefore, a situation in which Reynolds can show that he was prejudiced by the court's control of the conduct of the trial.*

Contrary to appellants' assertions, Judge Motley did not simply direct that summations would be limited to

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* Chester complains particularly with respect to the court's ruling that he alone was not permitted to cross-examine Stein on Stein's psychiatric history and that he was stopped from pursuing a line of questioning about Nordin's teen-age bride. A reading of his offers of proof (Chester's Appendix 9-18, 13-16), along with other indications of Chester's conduct at trial, see p. —, *supra*, demonstrates that the trial judge was acting well within her discretion in both instances. Further, as to Stein, it is abundantly clear that his psychiatric record was aired in its entirety to the jury during cross-examination by other defense counsel. Finally, Chester fails to note that at his instance, Stein's entire psychiatric report came into evidence (Chester Ex. 1), and that he did eventually question Stein briefly on his psychiatric history (Tr. 4404-05).

two hours. The court approached the subject flexibly, asking each attorney and *pro se* defendant how long he needed. Each told her he would need two hours or less. (Tr. 6494-97). Both the total amount of time allotted to the defense, at their own request, and the division of time between the defense and the Government were fair to the parties and reasonable in the circumstances of this case. It is within the discretion of the trial court to limit summations, and no prejudice to the defendants from the enforcement of the self-limitations can be shown. *United States* v. *Salazar*, 485 F.2d 1272 (2d Cir. 1973), *cert. denied*, 415 U.S. 985 (1974); *Hodge* v. *United States*, 271 F.2d 52 (5th Cir. 1959), *cert. denied*, 361 U.S. 961 (1960).

POINT VIII

The Prosecutor's Rebuttal Summation Was Proper.

A. The Prosecutor's Comments in Rebuttal Summation that the Record Showed Defendant Levine to Have Dealt with Co-defendant Stein in Other Stocks, in Response to Defense Counsel's Claim to the Contrary, Did Not Constitute Reversible Error.

In his summation defendant Levine's counsel argued, as will be set forth in more detail below, that Levine was not a close associate of Sidney Stein, one of the prime movers in the Stern-Haskell fraud who pleaded guilty and testified as a Government witness. Levine's counsel argued that Levine had not become involved with Stern-Haskell through Stein * and that Levine's only transac-

* Levine's counsel suggested that Levine became interested in Stern-Haskell through a deceased public relations man named Hector Benanti. (Tr. 1509a). There was no evidence of this.

tion with Stein was in connection with Levine's refusal to act as the underwriter of a company named Blank Furniture. In rebuttal, Government counsel responded by pointing out (1) that Levine's counsel had not asked Stein when he was on the witness stand whether there were any other dealings between himself and Levine and (2) that the blotter of Levine's firm, Lockwood and Company (GX 500), tended to contradict defense counsel's claim since it showed that the firm had traded many of the stocks which Stein admitted on cross-examination he had illegally manipulated.

Defense counsel now assert this argument to have been error, claiming (1) that the prosecutor improperly argued that Levine had committed other securities frauds, and (2) that entries in the Lockwood blotter were not in evidence except for entries reflecting Stern-Haskell trades. These defense claims are without merit, since the comments in the rebuttal summation were proper, and, even assuming *arguendo* several of defense counsel's premises, the comments were at most, as Judge Motley found, harmless error.

1. The Government's Rebuttal Was a Proper Response to the Summation for Defendant Levine.

a. The Defense Summation.

Defense counsel argues that he limited the relevant portion of his summation to a statement that the Government had not established that Levine had engaged in any of what lawyers call "similar acts." A fair reading of the summation for Levine reveals, however, that defense counsel went much further than he claims. A cornerstone of the defense summation was that Levine had not dealt with Sidney Stein in the Stern-Haskell transaction (1476a, 1506a) or any other transaction. (1513a-14a). According to defense counsel's argument, the only busi-

ness activity between the two men consisted of the Blank Furniture deal, which Levine rejected when proposed to him by Stein.* Defense counsel went on to ask the jury to find that Levine was a law-abiding** broker-dealer who did not, and would not, become involved with Stein.

Defense counsel began this point by arguing somewhat ambiguously that the failure of the Government to establish any "prior similar conduct or relationship" between Levine or Wax "and anybody else in this case, principally Sidney Stein" proved that no such "conduct or relationship" existed:

> "Now, you know, you have learned from this trial, that prior similar acts can be proven for certain purposes by the prosecution. You know that if someone does something which the prosecutor says is wrong, the prosecutor under some circumstances is entitled to show similar prior conduct for certain purposes, which Judge Motley will instruct you about when she charges you on the law.

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* Blank Furniture was a furniture company owned by unindicted co-conspirator Saul Weitzman. Weitzman testified that he first met Stein, Rubinson and Feiffer during the course of his efforts to obtain financing for Blank. He testified that it was in connection with a proposal to make a public offering of Blank stock that Stein first introduced him to Levine but that Levine declined a proposal that he underwrite the offering. Weitzman's office at Blank Furniture was also the site of several meetings concerning Stern-Haskell including the meeting of February 8, 1969 attended by Rubinson, Chester, Stein, Feiffer, Haskell and others. (398a *et seq.*, Tr. 2572). Defense counsel explored the proposed Blank underwriting in great detail during the cross-examination of Weitzman. (538a43a). Although the record contains no evidence showing why Levine declined to participate in the Blank underwriting, Levine's counsel suggested to the jury that Levine rejected the proposal because he did not wish to become involved in an unlawful transaction. (1513a-14a). There was no proof, however, of Levine's knowledge of any unlawful aspects of the Blank deal or of his reaction to whatever information he had, except that he rejected Stein's offer.

** Levine offered no character evidence.

> But nevertheless they can show it, and they eagerly try to show it whenever they have it. *You have never been shown, and you have not during this trial been shown, any prior similar conduct or relationship between Mr. Levine and Mr. Wax and anybody else in this case, principally Sidney Stein. If they existed you would have been shown.*" (1512a) (emphasis supplied).

Defense counsel, later speaking unambiguously, drove home the point he hoped the jury would focus on, that the only dealings between Levine and Stein consisted of the Blank Furniture deal:

> "*The only relationship we know about in this case and the only one that existed between Mr. Levine and Sidney Stein involved one transaction and that was the Blank Furniture deal.*" (1513a) (emphasis supplied).

Levine's rejection of the Blank Furniture transaction proved, according to defense counsel, that defendant Levine "is certainly not under Sidney Stein's thumb by any stretch of the imagination." (1513a). Rather, according to defense counsel, Levine's action established that "Stein knew Levine was not a guy to get involved in one of his dirty deals. . . ." (1514a).*

Defense counsel claims that by this language he argued only that the Government did not prove Levine or Wax participated in either of the two virtually identical trans-

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* Gerald Mark, Levine's assistant at Lockwood testified that he saw Stein come to visit Levine at Lockwood about once a week. (Tr. 4724). Weitzman also saw Levine at Stein's apartment. (426a-27a). In addition, Judy Steinberg and Joyce Benenson, secretaries at other brokerage firms, testified that they had instructions that, when they could not reach Stein at his apartment, they should try to reach him by calling Lockwood & Company, which they did on several occasions. (Tr. 4575, 5686-87).

actions to Stern-Haskell which the Government proved in its case in chief or any "similar" transaction. In evaluating this sanitized construction of the defense summation, it is appropriate to note that had defense counsel wished merely to remind the jury that defendants Levine and Wax had not been shown to have participated in the two similar acts proved by the Government—the Mobile Home Ventures and Diston Industries transactions—or any other transactions virtually identical to Stern-Haskell, he could have communicated this thought quite simply and clearly. Rather than make this accurate and limited point,* however, the record shows that defense counsel made the considerably broader argument that defendant Levine had only one business discussion with Stein, that being when Levine rejected the Blank Furniture deal, and that Levine and Wax had *no prior . . . relationship* with anybody else in the case "principally Sidney Stein." The fundamental message which defense counsel conveyed to the jury was that the evidence showed an absence of any

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* Appellants engage in considerable exaggeration of the significance of the similar acts at the trial, particularly as they affected defendant Levine. It was made clear throughout the trial that the Government did not contend that Levine participated in either the Mobile Home Ventures or Diston transactions, and, based on the nature of those transactions, there seems little likelihood of confusion or prejudicial spillover. Levine claims (Levine's Brief at 13) that over a week of the trial was devoted to the similar acts, and Rubinson asserts (Rubinson's Brief at 11) that nine witnesses were flown to the trial from Florida to testify concerning the Mobile Home Ventures and Diston transactions that that "several weeks" of the trial were devoted exclusively to similar act evidence. (Rubinson's Brief at 74). The basis for the defendants' time calculations is unclear, but the record shows that the Government called only five relatively short witnesses (Disner, Fenton, Stack, Kravetz and White), who testified exclusively about the similar act transactions. Several of the witnesses now claimed by Rubinson to be similar act witnesses (Weitzman, Hochen, Nordin, Myrtetus and Torelli) were in fact Stern-Haskell witnesses who also testified concerning the similar acts.

business association between his clients, Levine and Wax, and the witness Stein or any of the other defendants and co-conspirators.

b. The Government Rebuttal.

In response to this argument, the Government made two points: (1) that defense counsel had not asked the relevant witnesses whether there was any factual basis for the defense claim that the only business relationship between Levine and Stein or Kaye was the discussion of the Blank Furniture deal; and (2) that the Lockwood Blotter (GX 500) tended to contradict the defense argument by showing that Lockwood had transactions in a large number of the obscure stocks which Stein had admitted, during cross-examination, trading in an unlawful manner.* Government counsel went on to warn the jury

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* Stein's direct examination was substantially limited to questions concerning Stern-Haskell, Mobile Home Ventures, Diston Industries and National Ventures. Stein also testified on direct examination that he had arrived at an understanding with the Government that he would not be prosecuted for other crimes he had committed of which he informed the Government. (Tr. 3447). On cross-examination, the defense sought to explore in detail Stein's entire criminal history. (837a-42a). Stein was questioned at length about his fraudulent activities in many securities, and at one point testified that he had committed securities violations in connection with every stock he had ever traded, amounting to approximately 200 or 300 stocks. (843a). Among the stocks Stein was questioned about were Allen Electronics (1055a), Allura Industries (853a), Beuche Girod (849a), Cabot Knitting Mills (850a), Cadillac Knitting Mills (850a), Calculator Computer (Tr. 3933, 1055a), Loric (Tr. 4184, 4185,4 190), Fallon Smith, also known as Imperial Investments (899a-908a, 930a-41a, Tr. 4133-41), House of Knitting (856a-61a), David Auld (Tr. 3958, 1055a), and General Auto Parts (1055a). During Stein's cross-examination, defense counsel demanded, and were given, a handwritten list (Chester Exhibit G) of the stocks Stein had told Government representatives that he had manipulated. Chester offered the list into evidence but withdrew the offer when Feiffer's

[Footnote continued on following page]

against making assumptions concerning facts not proved and told them to concentrate on the proof related to Stern-Haskell. The challenged section of the Government rebuttal is as follows:

> "In addition, Mr. Andrews, after all of the evidence is in, says there isn't any evidence that Mr. Levine or Mr. Wax were involved in any other transactions with Mr. Stein; therefore, you should find, ladies and gentlemen, that this is a one-shot transaction and that all the rest of the time they were good little boys and they were never pulling off any frauds.
>
> You certainly didn't hear him ask that question when Stein was on the stand, did you? Did you get into any other deals with Mr. Levine? Did you hear him ask that one. Did you hear him ask Mr. Kaye whether there were any other deals with Mr. Levine or Mr. Wax? You sure didn't hear him ask that when the witnesses were on the stand. He didn't have the nerve to do that.
>
> Ladies and gentlemen, if you want to look at the evidence you look at this evidence, the Lockwood blotter that is in evidence. Mr. Wax's trades are in evidence. You are going to hear about some other stocks. Do you remember the stocks that Sidney Stein testified were manipulated stocks? Allen Electronics, Beta Orthodontics, Boujeray Watches, which Kravetz testified to, Cadillac Knitting Mills. Calculator Computer, David Ault, General Auto Parts, Fallon Smith, the great Imperial stock, Lanai. Loric, Viking General. They are all in the record, ladies and gentlemen, of the

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counsel objected. (950a-52a). The list was, however, repeatedly referred to and waved in front of the jury by defense counsel and the *pro se* defendants which is probably why the jury assumed that it was in evidence when it sent a note requesting the list. See *infra*, p. 105.

stocks being manipulated and brought out on cross-examination of the government witnesses. You didn't see him have the guts to ask that question when they were on the stand.

Well, ladies and gentlemen, just look in Mr. Levine's blotter, if you are really interested in that. Look at what Mr. Wax was selling to his customers, if you are really interested in that. And you will find an answer to that particular problem.

But the government didn't present that originally. Not because we didn't have it, not because we didn't particularly want to focus on it, but because you should focus on the evidence that is related to Stern Haskell, and the government submits that you should not be misled by suggestions as to what is not in the evidence or suggestions that there is something that's been left out because it isn't there." (1590a-91a).

These comments of Government's counsel were entirely proper. First, Levine's contention that the Government's argument really amounted to a claim that Levine and Wax had committed other crimes besides Stern-Haskell goes considerably beyond the words of the Government summation. Government counsel argued that the exhibit showed that Levine had transactions with Stein, but stopped short of claiming that it proved Levine had participated in crimes with Stein.

Furthermore, in evaluating the propriety of the rebuttal remarks, it is noteworthy that these were not issues the Government had sought to interject into the proceedings. The Government's case was substantially limited to activities in Stern-Haskell and National Ventures, the vehicle for the sham spin-off, and Mobile Home Ventures and Diston Industries, two companies for which similar spin-off schemes were devised. Although the Government's

case included an occasional mention of another company as background or as the location of an event, the Government did not seek to prove in its direct case any significant activities by defendants in stocks other than those four. Nor was this defense in response to any Government claim. Neither in its opening nor in its summation did the Government attempt to link any of the defendants to stocks other than the four in issue. The defense, however, was not content to try the case on the facts relating to those four companies, but instead insisted on cross-examining Government witnesses * concerning numerous other allegedly unlawful stock transactions and then arguing that Levine's and Wax's having not participated in any other transactions somehow proved their innocence.

In response to the summation for Levine and Wax, Government counsel had an obligation to enter the opened door to inform the jury that this defense argument was not supported by the record. See *United States* v. *Santana*, 485 F.2d 365 (2d Cir. 1973), *cert. denied*, 415 U.S. 931 (1974); *United States* v. *DeAlesandro*, 361 F.2d 694 (2d Cir.), *cert. denied*, 385 U.S. 842 (1966). For certainly where the defense based a significant claim on a fact not proved—the absence of other dealings between Levine and Wax and "anybody else in this case, principally Sidney Stein"—the Government was entitled to comment that the fact relied on by the defense had no support and that the defense failed to elicit from appropriate witnesses either the fact relied on or the contrary. See *United States* v. *Campo*, 414 F.2d 765, 767 (2d Cir. 1969). In addition, of course, the Government was entitled to point to what evidence there was in the record bearing on the defense's factual claim. And such evi-

* So it was that Stein, Kaye, Kravetz, Weitzman and, to a lesser extent, Hochen were cross-examined in various degrees about their activities in securities other than those at issue in this case.

dence there was, both in the form of the Lockwood Blotter (GX 500), and the testimony of numerous witnesses concerning the close relationship between Levine and Stein. Indeed, the argument made by Government counsel was supported by evidence other than the blotter. When Stein was cross-examined about his activities in the stock of Imperial Investment, he testified that one of the things he had done was "fill a short position for Mr. Levine." (Tr. 3932; 950a-56a).* In addition, Nordin referred to Lockwood in connection with Calculator Computer. (Tr. 690).

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* Levine's counsel claims prejudice from the Lockwood Blotter on the theory that Levine may not have been responsible for what happened at Lockwood since there were other employees and traders there. Defense counsel made the same argument to the jury concerning Lockwood's Stern-Haskell trades (1493a-96a), and the jury apparently rejected it. Since Government counsel stated in rebuttal that the records in question were Lockwood records, and the jury's note indicates that the jury understood that the book consisted of "Lockwood trading records" (1817a), the rebuttal argument did not deprive Levine of his right to have the jury consider his contention, in the face of considerable evidence to the contrary, that activities of Lockwood were not attributable to him. Levine also advances the theory that Stein had a motive, because of his agreement with the Government to maximize the number of his crimes and consequently may have testified falsely that stocks were traded illegally. Whatever the merits of this proposition, the defense exposed the jury to it (Tr. 3958; 1052a), so that, if the jury accepted this picture of Stein as one who claimed to have committed crimes he did not commit, then the challenged rebuttal argument would have had even less potential for prejudice.

The defense also argues that the rebuttal argument was not supported by the blotter because, although, there is no question that the stocks named in the rebuttal summation do indeed appear in Government Exhibit 500 as stocks traded by Lockwood, the blotter does not show a volume of trades in the stocks similar to the over 200,000 in Stern-Haskell. The limited number of shares traded in some of the stocks as shown by the blotter is explained by the fact that the exhibit covers a period of only slightly more than three months, from April 24, 1969 to July 31, 1969, with a few pages added from January and February 1970. The statement by the

[Footnote continued on following page]

2. Government's Exhibit 500, the Lockwood Blotter, Was in Evidence in its Entirety Until Withdrawn by the Government at the Request of the Defense.

Government's Exhibit 500, the Lockwood & Company blotter, was offered and received into evidence along with numerous other brokerage firm documents. (Tr. 4445-49). The record reveals no statement at the time the documents were offered or received to the effect that only portions of any of those exhibits were being offered or received, that any portions of the documents were being excluded from evidence, or that the documents were limited to any particular purpose. On the contrary, when the documents were offered the court inquired, referring to Government Exhibit 500 and accompanying exhibits, "Do you intend to offer all these exhibits in evidence?" Government counsel responded, "Yes, Your Honor." (1070a). Counsel for defendant Feiffer then commented:

> "If I understand correctly, all of these exhibits are being offered for the purpose of providing a basis for the charts which are going to be testified to by a Government agent, is that correct?"

To which Government counsel responded:

> "Among other purposes. Certain of them will be selected out and witnesses will refer to them, but, basically, they are the underlying documents for the charts." (1070a).

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defense (Levine's Brief at 9, 22), that the blotter shows all trades for the entire period of Lockwood's existence, is thus inaccurate. (The defense estimate of the size of the blotter (Levine Brief at 9) is also exaggerated. The exhibit is 14½" x 24" and 2¾" thick). Nor is it true that, as the defense claims (Levine's Brief at 11), Lockwood did not participate to a substantial degree in trades of any of these stocks. In fact, it was established by the Government in response to defendants' post-trial motions that Lockwood was the underwriter of two of them, Beuche-Girod and House of Knitting, performing a function quite similar to that it performed in the Stern-Haskell offering.

All counsel then entered into a stipulation establishing the authenticity and business record foundation of the documents. That stipulation was announced by Government counsel as follows:

> "It is stipulated between counsel for the Government and counsel for the defendants and by each defendant that if an authorized representative of Granger & Company, Shaskan & Company, TPO and Lockwood & Company, who is familiar with the books and records of that brokerage firm, were called as a witness, each would testify with respect to documents from his firm that the Government exhibits set forth below are all authentic documents or copies hereof.
>
> It is further stipulated that each would testify that the entries on each document were made in the regular course of business of the stock brokerage firm the document appears to be from and that it was the regular course of business of each brokerage firm to make and maintain such entries and records.
>
> I will put the exhibits to which that refers on the record.
>
> 194A, 196A through H, which are Granger records referring to the Feiffer account;
>
> Exhibits 198A and B, and 200A through C, which are Shaskan records referring to the Feiffer account;
>
> 202 and 203, which are TPO records referring to the Feiffer account;
>
> 205, 206A through K, 207A and B, 208A through E, 209A through F, 210A through D, which are both Granger and Lockwood documents referring to the B'Noth account;

Exhibits 232 and 233 which are Granger exhibits referring to the Silber account;

Exhibits 235 and 236A and B, which are Lockwood documents;

Exhibit 300 [sic]* which is the Lockwood blotter.

It is further stipulated that as to Exhibits 501 through 669T, which involved documents from over ten additional brokerage firms, that if an authorized representative of those firms were called he would testify with respect to the documents from his firm that those Government exhibits are all authentic documents or copies thereof; and it is further stipulated that each would testify that the entries on each document were made in the regular course of business of the stock brokerage firm the document appears to be from and that it was the regular course of business of each brokerage firm to make and maintain such entries and records.

All of the documents are with respect to transactions in Stern-Haskell stock. That would be the stipulation, Your Honor." (1073a-74a).

The court then inquired whether there were any objections to any of the documents. (1074a). Feiffer's counsel recited objections primarily on the ground that the documents had not been connected to his client. (1075a-77a). Levine's counsel objected to the admissibility of the Lockwood records on the ground that the documents were incomplete, constituting only a "partial set of records." (1077a-80a). This objection was resolved when the Government agreed to stipulate that some of the Lockwood

* The trial transcript should read "Exhibit 500" instead of "Exhibit 300."

records were missing. (1080a).* The court then announced, "With that understanding, it will be admitted." (1080a).

Government Exhibit 500 bears an exhibit tag on the front cover and also exhibit tags (GX 500A-500U) on twenty-one of its pages.** No portions of the exhibit were ever masked out, nor was there any agreement to do so.

Judge Motley's finding that Government Exhibit 500 was admitted into evidence in its entirety, was clearly correct. She so found during the discussion of the defense's objection to the Government rebuttal (1802a), and reiterated the same conclusion after the trial. (2132a, 2134a). As Judge Motley observed (2128a), if only a portion of the exhibit had been coming into evidence, the portions coming in and the portions being excluded would have been clearly described on the record and the court would have admitted only the portion being offered. At this trial on the several occasions when the court admitted only portions of documents, the limitations were clearly expressed and the exhibits marked accordingly. (Tr. 3658, 4851-58, 5396, 5409, 5439-40. See also 1287-76, 1407, 1521-37, 1889). No such limitation occurred with respect to the Lockwood blotter, and consequently it was received in evidence in its entirety. See *United States* v. *Burket*, 480 F.2d 568 (2d Cir. 1973).

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* Defense counsel's observation (Levine's Brief at 9) that the documents were stipulated into evidence is thus not quite accurate. Rather, their authenticity and business record foundation, which the Government could easily have established through the two Lockwood employees, Mark and Ochart, who appeared as Government witnesses, were established by stipulation. The documents were then admitted after some discussion and over at least one objection.

** The individually marked pages consisted of twenty-one of the fifty-eight pages of Government Exhibit 500 containing Stern-Haskell entries. (Affidavit of Daniel J. Schatz, sworn to September 3, 1975). On at least one other occasion during the trial, with Government Exhibit 55, a group of stock certificates, pieces of a group of documents marked as one exhibit were also marked individually to allow counsel to refer to the individual pieces easily.

The defense claim that Government Exhibit 500 was limited by the stipulation announced by Government counsel does not find support in the record.* The stipulation contains no language limiting admission of the blotter (GX 500) to Stern-Haskell entries. (1073a-74a). Government counsel's statement that "all the documents are with respect to transactions in Stern-Haskell stock" (1074a) is considerably less than a statement that only certain entries in Government Exhibit 500 were being admitted into evidence and others were being excluded. As the Assistant United States Attorney explained to the Court, she did not regard that statement as an agreement to exclude portions of Government Exhibit 500, but rather as a partial description of the exhibits referred to in the second half of the stipulation, Government Exhibits 501-669T. (1799a-80a, 1831a-33a). Such a description was not inappropriate in light of the frequent disputes during the trial about whether various items of proof related to Stern-Haskell, Mobile Home Ventures or Diston.

The defendant's claim of error in Judge Motley's denial of a request for a hearing at which attorneys would testify as to their off-the-record understandings concerning limitations on Government Exhibit 500 is likewise without merit. Judge Motley was clearly correct in concluding that such a hearing would have produced nothing more than a defense assertion and a

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* Defense counsel stated, when they first announced their objections to the rebuttal, that they understood, based on off-the-record conversations with Government counsel that GX 500 was being admitted solely as support for the chart of all Stern-Haskell trades. The record explicitly refutes that claim. When Feiffer's counsel asked if the documents were coming in only to support the Government's charts, Assistant United States Attorney Harris replied, "Among otner purposes . . . ." (1070a).

Government denial * (which the court already had) and that the trial record was the proper basis for deciding this issue. (1804a). The problems of litigation would be multiplied considerably if trial courts were required to conduct constant surveillance over the possibility of off-the-record agreements among parties to limit evidence. See *Int'l Business Machines Corp.* v. *Edelstein*, Dkt. No. 75-3056 (2d Cir., October 29, 1975). Surely the experienced defense counsel in this case knew that the record must clearly reflect any such understandings.

In addition, even if Judge Motley had found that Government Exhibit 500 was in evidence only for a limited purpose, there is authority that once the defense argument had opened the door, the court could *then* have admitted the exhibit for all purposes. See *United States* v. *Fort*, 443 F.2d 670 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 932 (1971).

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* During the colloquy on this subject and later in papers on the post-trial motions both Assistant United States Attorneys who represented the Government at this trial denied making any agreement with defense counsel limiting the admission or use of Government Exhibit 500. (1784a-85a, 1799a-1800a, 1831a). In addition, the Government produced an unsigned draft of the stipulation which had been circulated and agreed on by counsel. The draft contained no mention of limiting the use of Government Exhibit 500. (Affidavit of JoAnn Harris, sworn to August 22, 1975 filed in opposition to Levine's post-trial motion). After the trial, Government counsel discovered that the SEC investigator working on this case had told defense counsel when neither Assistant United States Attorney was present that the blotter would be limited to Stern-Haskell transactions. The investigator's statement was unknown to the Assistant United States Attorneys in charge of the case and was made without actual or apparent authority to limit the use of Government evidence. (Affidavits of Daniel J. Schatz, sworn to September 3, 1975, and Frank H. Wohl, sworn to September 4, 1975 filed in opposition to Levine's post-trial motion).

3. The Prosecutor's Reference to Other Stocks, if Error, Was Harmless.

Even assuming *arguendo* the prosecutor's comments were error, they were not so prejudicial to any defendant's rights as to require reversal of any of the convictions.

As the District Court found in its post-trial opinion, the only convicted defendant conceivably affected by the challenged argument was Levine * (2048a), and Judge

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* Rubinson argues that he was prejudiced by the rebuttal summation, because the prosecutor "suddenly and without warning branded the . . . companies [mentioned] as 'frauds' and 'manipulated stocks.'" (Rubinson's Brief at 74). This argument ignores the fact that it was the defense, on cross-examination of Stein, which did the "branding" of transactions as crimes. *Supra* p. 91n. In addition, the distinction was clearly drawn for the jury between unlawful market manipulations, in which Stein said Rubinson was not his partner (846a), and the spin-offs of Allen Electronics, Calculator Computer, David Auld and General Auto Parts, which defendants asserted to the jury were lawful spin-offs, a claim which the prosecution was content to ignore since the defendants were not indicted for those transactions. (Tr. 2648-49, 2652-53, 4384-86). The prosecutor's rebuttal comments served merely as a way of drawing the jury's attention to the group of stocks he was talking about, those Stein had testified under *defense* questioning to have been manipulated. Rubinson also complains about the court's refusal to allow him to fully develop evidence of other spinoff transactions which the Government did not seek to show were illegal. Judge Motley found those transactions to be different from the Stern-Haskell spinoff and therefore of little probative value. She also noted that presentation of any such matter would be appropriate, if admissible at all, in the defense case (Tr. 2768-96). In light of the additional trial time it would have taken, in an already long case, to explore four more spinoffs of dubious relevance, Judge Motley's decision to exclude the proof offered by Rubinson was well within the court's discretion. See Rule 403, Federal Rules of Evidence.

Counsel for Reynolds argues to this Court that the challenged rebuttal comment affected Reynolds because it "rehabilitated

[Footnote continued on following page]

Motley's conclusion that the rebuttal summation comments were not so prejudicial to Levine as to require reversal is well supported.

An examination of the trial record here leaves no doubt that the jury's attention was focused during this eight-week trial on activities in the stock of Stern-Haskell and could not have been drawn off that track by the rebuttal comments, even if construed as the defense claims. This jury heard over thirty witnesses and received over 400 documents describing in microscopic detail the origin, distribution and market in Stern-Haskell stock—complete with a chart of every trade in the stock (GX 670) and a chart of the flow of shares from the company to the public (GX 27). The indictment which the court read to the jury (1650a-55a, 1675a-77a, 1686a-88a, 1690a-93a, 1696a-98a), charged only violations concerning transactions in Stern-Haskell stock. The District Court also carefully instructed the jury that a finding of guilt of the conspiracy count, the only count on which it found defendant Levine guilty, required a finding that the defendant joined a scheme to commit fraud in connection with Stern-Haskell transactions.* (1664a, 1670a). The jury received similar instructions on the substantive counts. (1680a-84a, 1689a, 1699a, 1702a, 1703a, 1705a, 1707a-10a, 1713a-14a). In addition,

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Stein." (Reynolds' Brief at 58); Chester also attacks the rebuttal comments. (Chester's Brief at 20-21). The simple answer to these arguments is that the challenged remarks had nothing to do with Stein's credibility, since part of the prosecutor's point was that Stein had not been asked and did not testify to the facts asserted in the defense summation. Moreover, it is difficult to see how the fact that Levine and Wax were trading stocks associated with Stein had any effect on the cases against Rubinson, Chester and Reynolds. Finally, Stein hardly mentioned defendant Reynolds, so even "rehabilitation" of Stein would not have strengthened the case against Reynolds.

* Judge Motley also instructed the jury that "mere association with one or more members of a conspiracy does not make one a member of a conspiracy." (1667a).

Judge Motley told the jury that the evidence of similar acts which the Government did prove, concerning transactions in Mobile Home Ventures and Diston Industries, was limited to the issue of the knowledge of the four defendants alleged to have participated in those transactions, and that "these four defendants are not on trial for events relating to those similar transactions." (1630a; see also 236a-37a, 846a). Indeed, the prosecutor at the end of the challenged rebuttal passage told the jury, "You should focus on the evidence that is related to Stern-Haskell." (1591a).*

In the context of this "long and hotly contested trial," *United States* v. *White*, 486 F.2d 204, 206 (2d Cir. 1973), *cert. denied*, 415 U.S. 980 (1974), then, the defense argument for reversal assumes, first, that the jury would extract the meaning argued by the defense from the rebuttal comments, a meaning which, if present, is "not obvious," *United States* v. *Mallah*, 503 F.2d 971, 979 (2d Cir. 1974), *cert. denied*, 43 U.S.L.W. 3515 (March 25, 1975), and then, in addition, that the jury would ignore both the indictment and the District Court's instructions. Indeed, the only plausible explanation of the verdict convicting Levine lies in the overwhelming proof of his guilt. (See Point III, *supra*).

The fact that the jury asked for the Lockwood Blotter (GX 500) and Stein's list of stocks, along with many other exhibits,** hardly supports defendants' arguments

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* A reading of the Government's initial summation (1289a-1431a), the rest of the rebuttal summation (1549a-99a) and the opening (157a-211a) show clearly that this jury was told repeatedly that the questions before it in this case related to transactions in *Stern-Haskell*.

** The jury also asked for the indictment and written copies of the court's charge (Tr. 7262), the flow charts of National Ventures and Stern-Haskell stock (GX 23, 27), Ingrid Nelson's charts of all trades in Stern-Haskell (GX 670), all pink sheet quotations in Stern-Haskell (GX 671) (Tr. 7269), and various documents "in evidence" concerning acquitted defendant Gardner. (Tr. 7266, 7273).

here since the act of requesting the document is ambiguous, and the jury was instructed, pursuant to the Government's agreement, that the non-Stern-Haskell entries were not in evidence.* Indeed, the jury acquitted defendant Wax, who was equally affected by the challenged rebuttal comments. See *United States* v. *Mallah*, *supra*.

4. The Post-summation Events, out of the Presence of the Jury, Do Not Advance Defendant Levine's Position.

Defendants' heavy reliance on the events while the jury was deliberating, including the perhaps overly generous statements of Government counsel, ignores the fact that the long and heated colloquy was out of the presence of the jury and had no effect on the verdict except that the jury was told, at the request of both the Government and the defense, that the Lockwood Blotter (GX 500), other than entries relating to Stern-Haskell trades, was not in evidence. (1852a-53a). The post-summation events do not strengthen defendants' appellate claims, but rather exhibit the Government's efforts to avoid either actual or apparent unfairness to the defendants.

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* The jury's requesting the Lockwood Blotter (GX 500) only "if in evidence" demonstrated an awareness of the significance of whether or not material was in evidence. This sensitivity was not particularly surprising since on several occasions defense counsel and *pro se* defendants had found ways to exhibit to the jury documents which were not admitted into evidence (1772a-74a, Tr. 6756, 6993, 7273-88, 1437a-41a). The court instructed the jury on several occasions that it should only consider material in evidence. (1604a, Tr. 6, 11). Government counsel also warned the jury against considering material not in evidence. (1549a-50a).

The court heard objections to the rebuttal summation on the day following the charge to the jury.* Levine's counsel objected to the portion of the rebuttal relating to the dealings of Levine and Wax with Stein in stocks other than Stern-Haskell on the grounds that Government counsel had told the jury about other crimes of Levine and Wax for which the defense had had no notice and that Government Exhibit 500 was not entirely in evidence pursuant to off-the-record discussions with Assistant United States Attorney Wohl. (1780a-82a). The court ruled that the exhibit was entirely in evidence and denied the defense motion. (1802a).

After the luncheon recess, however, Government counsel brought to the court's attention that, early in the trial, while the two prosecutors in charge of this case had been ill, another Assistant United States Attorney who filled in temporarily to allow the trial to go forward (Tr. 309-517) had agreed to limit Govenrment Exhibit 75 (Tr. 506, 510, 512), the record of defendant Wax's securities transactions, to Stern-Haskell trades only. (1806a). Although this error concerning Government Exhibit 75 did not affect Government Exhibit 500, the Lockwood Blotter, Government counsel suggested that the court instruct the jury to disregard all comments concerning stocks other than Stern-Haskell in the rebuttal (1810a). Defense counsel objected to such an instruction on the ground that it would highlight the matter and "blow it way out of perspective in the jury's eyes." (1812a).

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* At the beginning of the Government's initial summation, defendants and counsel on three occasions interrupted the prosecutor with various objections and counter-arguments (1296a-98a, 1299a-1300a, 1325a). The court therefore instructed counsel and defendants to desist from interrupting the Government argument (1334a, 1772a-74a). Prior to the Government's rebuttal, the court also instructed defendants and defense counsel to hold any objections to the rebuttal until it was completed (Tr. 6976-79, 2048a).

A few minutes later a note came in from the jury asking for "the list of stocks Stein had presented and said he was involved in, Stein's psychiatric records and, if in evidence, the Lockwood trading records." (1817a). The discussion of Government Exhibit 500 then resumed, this time with defense counsel claiming that Assistant United States Attorney Harris had represented that the exhibit was being admitted only for the purpose of backing up the charts and with reference only to Stern-Haskell (1829a, 1834a). Assistant United States Attorney Harris stated that she knew of no agreement to limit the exhibit. (1831a-33a). Defense counsel asked for a mistrial. (1839a).

Government counsel, however, out of an abundance of caution and a desire to avoid even the appearance of unfairness to the defendants, suggested that, although the exhibit had been admitted in its entirety, there appeared to be a misunderstanding about it among the defense counsel. Since the Government did not wish to rely on the technical point that the document had been admitted through inadvertence or misunderstanding, the prosecution agreed with the defendants' request that Government Exhibit 500 not be given to the jury and again requested that the jury be instructed to disregard the comment in the Government's rebuttal concerning stocks other than Stern-Haskell. (1842a-43a).

The court therefore instructed the jury that only the Stern-Haskell entries in Government Exhibit 500 were in evidence and that those pages could be removed from the book and given to the jury, although the same information had already been summarized in the schedule of Stern-Haskell trades. (GX 670). The court also instructed the jury that Stein's list of stocks had not been admitted into evidence, noting that documents shown to witnesses are not necessarily received in evidence.* One

* The jury received Stein's psychiatric report and was told that it could not be provided with a list of exhibits because the lawyers' lists included documents not in evidence as well as those in evidence. (1852a-53a).

of the jurors then volunteered that the exhibit would not be necessary. (1852a-53a).

Several hours later all counsel submitted a proposed additional jury instruction which read as follows:

> "During the government's final summation Mr. Wohl referred to certain stocks other than Stern-Haskell which Mr. Stein stated he had been criminally involved in, and asked you to draw certain conclusions based on certain records of Lockwood and Company.
>
> That reference was based on a good faith misunderstanding among counsel and the government. We have now cleared it up. And I instruct you that you should entirely disregard Mr. Wohl's comment because it has not been established, and the government does not contend, that defendants Levine and Wax and Lockwood and Company committed any criminal acts concerning any of these stocks other than Stern-Haskell." (1913a-14a).

The court declined to give the instruction, stating:

> "It is my view that the only thing this additional instruction is going to do now is highlight the matter and will not cause the jury to wipe from its mind anything which has already been said and the jury seemed to accept right away my explanation as to the blotter and was content not to see it after I explained what it was limited to.
>
> So it seems to me that bringing this matter up again is going to work the prejudice which you think is going to be eliminated.
>
> As I pointed out earlier, this whole business, the door to this was opened by Mr. Andrews and

that caused the Government to take the action which it took in rebuttal. It is the Court's view that it cannot permit defense counsel in cases like this, to get up and make statements feeling that the Government's hands are tied and then complain when the Government rebuts it, and that is what we have here.

As I have said, I think if there is any damage it has already been done and this instruction is not going to do anything but highlight it." (1854a).

The following day the court had an additional discussion with counsel concerning the meaning of the proposed additional instruction. (1856a-86a). During that discussion Government counsel explained to the court that the intended thrust of the challenged remarks in rebuttal was not to tell the jury that defendants Levine and Wax had committed criminal acts other than those charged and that the Government did not contend that it had established such other crimes in this trial. Government counsel agreed that, if the remarks were construed to state that Levine and Wax had committed other crimes besides Stern-Haskell—without agreeing that the remarks should be so construed—Government Exhibit 500 would not establish this claim, since more evidence than that shown in the blotter would be needed to establish defendants' culpability. The District Court concluded that the purport of the challenged rebuttal remarks was that defendants Levine and Wax had participated in frauds other than Stern-Haskell. Judge Motley therefore asked Government counsel for his basis outside the record for the comments as she construed them. Without agreeing with the District Court's construction of the rebuttal comments, Government counsel described some of the

evidence known to the Government concerning other activities of defendants Levine and Wax.*

During this discussion the jury returned its verdict. (1886a).

A review of these events supports Judge Motley's conclusion, based on the entire record, that any error by the Government, if there was error, was not intentional.** (2054a). As soon as Government counsel noticed a problem (the fact that Government Exhibit 75, the record of Wax's trades, was not in evidence in its entirety) the matter was brought to the District Court's attention. (1806a). The Government immediately requested that the jury be instructed to disregard all mention in the rebuttal of stocks other than Stern-Haskell. (1810a). The defense disagreed with this request. (1811a-12a). When the jury requested the contested evidence, Government Exhibit 500, the Government asked the District Court not to submit it to the jury in light of the apparent misunderstanding about its admission into evidence. (1841a-42a). The court complied with this request, instructing the jury that Government Exhibit 500 was not in evidence, except for the Stern-Haskell trades. (1852a-53a).

In conclusion, we submit that the rebuttal comments were a proper response to the defense argument, but that,

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* Subsequently in response to post-trial motions the Government showed that Lockwood & Company was in fact the underwriter of two of the stocks mentioned in the rebuttal comments, Beusch-Girod and House of Knitting, disproving defense counsel's claim (1849a, 1859a) reiterated in this Court (Levine Brief at 11) that Levine had engaged in only a few isolated trades in the named stocks and had not traded a major portion of any of those shares. (Affidavit of Frank H. Wohl, sworn to May 20, 1975).

** Judge Motley also concluded that this case was not one in which the "prosecutor pursued a course of misconduct or impropriety. . . ." *Cf. United States* v. *Drummond*, 481 F.2d 62 (2d Cir. 1973). Indeed, the Government here presented a well-reasoned temperate and methodical case." (2054a).

if the rebuttal was error, it was unintentional and not so prejudicial as to call for reversal.

B. The Government's Rebuttal Did Not Improperly Prejudice Chester.

Defendant Chester advances several additional claims of error in the rebuttal summation. The record reveals that the Government rebuttal was an appropriate response to defendant Chester's summation.

Chester, an attorney, delivered his summation immediately prior to the Government rebuttal, pursuant to an agreement among defense counsel that Chester would deliver the last of the defense summations.* Chester's summation consisted in large part of self-serving statements of facts—unsworn and not subject to cross-examination, references to documents not in evidence, and a vitriolic attack against the prosecutor in charge of the case, unsupported by any evidence, claiming various forms of prosecutorial misconduct. Chester used his summation as an opportunity to tell the jury that he had never met co-defendants Feiffer, Levine, Wax or Gardner (Tr. 6991-92, 6996), that he had never spoken to anyone from Stern-Haskell prior to the February 1969 meeting at Blank Furniture (Tr. 7049), that he had never heard of Jerry Becker, one of Nordin's false names (Tr. 7012), that prior to the trial he told various potential witnesses to tell the truth (Tr. 7039), that he had given away National Ventures stock as a joke, not as a ruse to fraudulently expand the number of stockholders (Tr. 7038), that the land in Peru was not a copper mine as Hochen had testified (Tr. 6997) and that he could not remember certain other facts. (Tr. 7032). He also told the jury that a no action letter from the SEC which he had not been

* Other defense summations had consumed the prior day and part of the day before that.

allowed to put into evidence helped his defense. (Tr. 6993, 7026).* Chester's attack on Government counsel permeated his summation. He claimed that the prosecutor had improperly influenced the grand jury which was his "rubber stamp" (Tr. 6986, 6987, 6989, 7022, 7023); that he had told witnesses what to testify to (Tr. 7008-10, 7043-44, 7046); that he had hidden undescribed exculpatory documents (Tr. 7022); that he had misused the power of his office—here Chester referred to former President Nixon—(Tr. 6986); and that the prosecutor sought political advancement—would become the United States Attorney and "might run for President"—as a result of the case. (Tr. 7002, 7039). He referred to the Government's method of proof as "sneaky" (Tr. 7007) and Government counsel as "old sneaky." (Tr. 7014). He also criticized the prosecutor's objections (which were frequently sustained) (Tr. 7017, 7021) and phrasing of questions. (Tr. 7030). Chester also told the jury that Sidney Stein, who had testified that he pled guilty to offenses carrying a maximum sentence of twelve years, really was going to go free, if he ever was in fact sentenced. (Tr. 7002-03, 7015-16, 7052). Chester also relied on the Government's failure to call as witnesses Chester's ex-wife, Frances Roberts (Tr. 7005-06, 7021); his friend, Andrew McKay (Tr. 7020), the president of Mobile Home Ventures (Tr. 7029); and another SEC expert. (Tr. 7021). Chester asserted that the trial was unnecessarily long because he would have stipulated to any of the facts proved by the Government.** (Tr. 6984). Finally, he told the jury that, if he were convicted, he would be disbarred. (Tr. 7055).

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* Rubinson had already done the same thing in his summation for which the court had reprimanded him. (1437a-41a, 1445a-46a).

** Chester's vigorous cross-examination of such witnesses as Nordin, Stein, White, Weitzman and Hochen belies this claim.

In response to Chester's summation, the Government's comment that Chester's heated presentation of material not in evidence was a continuation of the fraud was not inappropriate. In fact, it was an accurate characterization of exactly what Chester was doing—using his summation to testify to his innocence without subjecting himself to cross-examination, telling the jury that a defendant who had pleaded guilty was not really going to be sentenced and would in any event escape without punishment,* and attempting to divert the jury's attention from the issues before it by unrestrained and unsupported claims of misconduct against the prosecutor.

It was also appropriate in response to Chester's claims that the Government should have called his ex-wife Roberts, his friend McKay, and others as witnesses, for the Government to point out that Chester had called no witnesses when he had the opportunity; and, in response to Chester's argument that the Government did not produce Toy King records, to note that according to the evidence the records were last in Chester's possession and that he could have produced proof concerning Toy King had he wished to do so, although he had no obligation to do so:

> "The Government submits that we established about four or five situations here:
>
> Use of nominees, the land, the checks going back and forth, the shareholders, the expansion of the shareholders' list.
>
> There is no evidence other than exactly what the Government witnesses testified to on that. It wasn't just Stern Nordin, by the way, who talked about expanding the shareholder's list.

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* On March 28, 1975, Stein received a sentence of ten years and a $25,000 fine.

Do you recall what Mr. Hochen said? He said Chester called him and said, I need more shareholders and would you buy stock and put it in these other names? Don't put it in your own name.

Mr. Chester says: 'Well, how about bringing in the records of Toy King? That would establish why didn't we do that?'

The defendants didn't produce anything when they were given their opportunity and you recall what the evidence was as to where the last place the Toy King records were. They were in Bill Chester's house in Florida.

Have you heard any evidence that suggests that the Government has the Toy King records?

You certainly have not. That was just one of those little twists to give you the impression that there was something there that may or may not be there.

The Government submits to you that you should keep your eye on what the evidence was, and the evidence was in this case from two witnesses that Mr. Chester wanted to expand the number of shareholders of that corporation, and from one witness that it was 75 to 80 shareholders, and when Mr. Chester had an opportunity to prove anything different he certainly didn't do it.

Now, he doesn't have to prove anything, that's true, but he can't come along and suggest to you that because of the fact that some records weren't produced that, therefore, you should imagine there was other proof, you should imagine there was conflicting proof, or some sort of defense in this case.

Don't do that, ladies and gentlemen.

We submit that we have established the proof to your satisfaction, and a lot of this imagination and innuendo about what might be somewhere else is nothing more than that, and is a continuation of an effort to fool you, just like they wanted to fool the SEC originally." (1576a-78a).

Later in the rebuttal Government counsel argued:

"They also say there weren't enough witnesses, and I have counted up some eight or so different witnesses, that the defense now says the Government should have called, whereas at the same time they are screaming about the fact that the case took so long.

Ladies and gentlemen, first of all, the Government's obligation is to prove this case beyond a reasonable doubt, and we submit that we have done that. We submit, furthermore, if there are any of these witnesses, including Mr. Reynolds' father, that they are even suggesting we should have called, or Chester's ex-wife that they are suggesting we should have called, if there are any one of those witnesses who would have done one whit of good for any of these defendants, either because they would have had something relevant to say or because they would have exculpated any of these defendants, you could bet your bottom dollar any of these defendants would have had them in here, whether it was Ben Malmeth, whether it was an ex-wife, whether McKay, whether Reynolds' father, or whether it was Tom Fox, the expert, who was sitting right here in court, and all they had to do was stick him on the witness stand.

They could have called him and didn't. The reason is, ladies and gentlemen, or you may find the

reason is, it wouldn't have done them any good, and they knew it, and that's why they didn't call them." (1594a-95a).

These comments were entirely proper. *United States* v. *Tramunti*, 513 F.2d 1087, 1119 (2d Cir. 1975); *United States* v. *Lipton*, 467 F.2d 1161, 1168-69 (2d Cir. 1972), *cert. denied*, 410 U.S. 927 (1973).

But if there was any ambiguity about the Government's comments on this point, the court cleared it up a few minutes later by instructing the jury:

> "You will recall that Mr. Wohl said that the defendants failed to call any witnesses.
>
> I want to say that that is not to be construed by you as a statement by him that the defendants should have taken the stand.
>
> As I told you, the defendants are not required to testify, are not required to call any witnesses.
>
> But Mr. Wohl was permitted to say that they could have called witnesses to testify as to certain things. That is different from saying that the defendants should have or could have taken the stand.
>
> So I didn't want you to be confused by that. That was just a suggestion that the defendants could have, if they wanted to, called various witnesses." (1601a-02a).

In sum, the rebuttal comments here challenged were appropriate in response to the defense summation and in the context of the entire trial.

POINT IX

The Claims of Error in the Court's Charge to the Jury are Meritless.

Judge Motley's charge to the jury in this case consumed nearly four hours and 120 pages of the record. Appellants have raised a number of claims of error. Each claim is entirely without merit.

A. The Conspiracy Charge.

Levine's complaint is that Judge Motley did not, in so many words, charge the jury that, if they should find the Government failed to prove the single conspiracy alleged in the indictment, they should acquit all defendants.* The court's failure to charge as requested, Levine argues, made it likely that the jury would return guilty verdicts even if they found two conspiracies or, moreover, the six conspiracies Levine apparently sees in the evidence. Further, Levine asserts that the court's use of an "a", rather than a "the", in a phrase in the court's charge on conspiracy compounded this likelihood by suggesting to the jury that they could returr a guilty verdict if they

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* Counsel, when he excepted to the court's charge, stated:

"Mr. Grimes: On pages 61 and 72 you mentioned multiple conspiracies, and I think Your Honor should . . .

The Court: Do you want me to accept your charge [Levine Request No. 9].

Mr. Grimes: Not the entire charge. I have just one sentence that you should add on there.

The Court: Read it into the record.

Mr. Grimes: "If you find separate conspiracies and that some of the defendants belonged to one and not the other, then there would be no proof of the single conspiracy charged in the indictment and in that case you must return a verdict of not guilty as to all of the defendants under the conspiracy count. That is all I wanted to add.

The Court: I don't plan to add that. (1736a-37a)."

found a defendant gulity of any conspiracy that happened to occur to them.*

This argument utterly ignores the fact that, prior to the court's specific charge on the single conspiracy, Judge Motley made it abundantly clear to the jury that to convict they would first have to find "the existence of the conspiracy alleged in the indictment" (1659a), that only if they found an agreement to "work in furtherance of the unlawful scheme alleged in the indictment" would proof of the existence of the conspiracy be complete (1662a-63a); and that, if they did "conclude that the conspiracy as charged did exist", only then should they turn to determining whether a particular defendant was a member. (1665a). Then there followed an entirely adequate description of how the jury was to make a

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* The court's specific charge on the subject of single conspiracy is set out below. The offending "a" is emphasized:

"The indictment charges, and the Government contends, that the evidence presented at the trial shows the existence of a single, integrated scheme to defraud brokers, bankers and individual investors in connection with sale and purchases of the stock of Stern-Haskell, Inc.

If you find that the scheme encompassed a variety of purposes and that a number of successive steps or stages were required in an effort to attain a central aim or purpose and that there was a nucleus of persons with a common objective, this would be a single, overall conspiracy. This is so even though you find that the scheme encompassed different subordinates and a division of labor among them in fulfilling the objectives of the central scheme and even though each of the members of the conspiracy was not aware of all of the purposes of the conspiracy.

Although it is necessary that you find that a single, overall conspiracy existed, it is not necessary that you find that all of the defendants were members of such a conspiracy in order to convict those defendants whom you find were members. If you find that one or more of the defendants who were members guilty of the conspiracy charge. You must find a defendant who was not a member of *a* single conspiracy not guilty of the conspiracy charge." (1670a-71a).

separate determination of the membership of each defendant in the conspiracy.* (1665a-68a).

Clearly then, when the judge's instructions are read as a whole, as they must be, *Cupp* v. *Naughten*, 414 U.S. 141, 146-47 (1973), it is manifest that the jury was properly instructed that to convict, it was necessary for them to find *the* single conspiracy the Government had charged in the indictment. The facts in this case, though extensive, were not complex. There is therefore no reason to believe that the jury was in the least confused about the necessity of determining whether the appellants were members of the single conspiracy charged. Only one conspiracy, we submit, was proved—that alleged in the indictment—and that is the conspiracy for which Levine was convicted. In these circumstances, Judge Motley's charge was not erroneous. *United States* v. *Calabro*, 449 F.2d 885, 892-94 (2d Cir. 1971), *cert. denied*, 405 U.S. 928 (1972). While if she had agreed to give the charge requested she might not have been faulted, *United States* v. *Bynum*, 485 F.2d 490, 497 (2d Cir. 1973), *cert. denied*, 44 U.S.L.W.—(Nov. 11, 1975), Levine was clearly not entitled to it as a matter of law, *United States* v. *Tramunti*, *supra*, 513 F.2d at 1107-08, and the court acted properly in rejecting it. *United States* v. *Leonard*, Dkt. No. 75-1153, slip op., at 5851 (2d Cir., Aug. 28, 1975); *United States* v. *Kelly*, *supra*, 349 F.2d at 759.**

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* The Judge reminded the jury on a number of other occasions that they must consider each defendant separately with respect to each count. (1603a, 1607a-09a, 1659a).

** Indeed, it is arguable in light of Levine's claim that he was not proven to be a member of the single conspiracy that such a charge would have prejudiced him. *United States* v. *Kelly*, *supra*, 349 F.2d at 757-58.

B. Count Fourteen.

Reynolds claims that Judge Motley's charge to the jury with respect to the sale of unregistered securities count (Count Fourteen) (1699a-1710a) was "so vague as to allow the jury to convict Reynolds . . . simply because he was an associate of Chester's . . .". (Reynolds' Brief at 46). More specifically he seems to contend that the portion of the charge which dealt with the requirements of registration (1704a-10a) failed to assist the jury in determining who was or was not a "control" person and instead merely repeated the various statutes involved, with Government contentions "sprinkled in".

Contrary to Reynolds' assertion, Judge Motley undertook to instruct the jury on the indices of "control" (1705a-07a) and the interpretation she adopted is fully supported by precedent.* The jury was therefore adequately and correctly advised, and there is no basis for a claim of error merely because Reynolds would have preferred that the Judge address herself to his case in particular.

Similarly, Reynolds would have preferred the Judge to have charged his theory with respect to "control" persons, when she charged the Government's theories.** But the

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* See, *e.g.*, Rule 405 of the Regulations of the Securities Exchange Commission, Securities Act of 1933; 2 Loss, Securities Regulation 780-81 (2d ed. 1961); *cf. United States* v. *Wolfson*, 405 F.2d 779 (2d Cir. 1968), *cert. denied*, 394 U.S. 946 (1969); *SEC* v. *Culpepper*, *supra*, 270 F.2d at 245-47. As this Court has said, "[t]he meaning of 'control' under the act is no different than it is in normal everyday usage". *United States* v. *Re*, 336 F.2d 306, 316 (2d Cir.), *cert. denied*, 379 U.S. 904 (1964).

** Reynolds requested that the court charge the jury that he contended he "was not an issuer, underwriter or dealer with respect to the stock of Stern-Haskell, and, therefore, his sale of 18,750 shares of that stock to B'Noth Jerusalem on June 6, 1969, was exempt from the registration requirements of the Securities Laws." His requests to charge did not mention the phrase "control" person. (Reynolds Request to Charge No. 6).

Judge charged the Government theories by way of directing the jury's attention to the specific questions it would have to resolve. Reynolds' theory, clearly enough, was that he was simply not a person who could be required to register the Stern-Haskell stock. It is difficult to see what that obvious aside would have added to the jury's understanding of the issues, and further, the Judge had already covered defense contentions, in full, earlier in the charge. (1627a-30a).

Finally, when Judge Motley told the jury that "you are not required to consider each stage of the transactions here in issue . . . as isolated events," she was just as clearly communicating to the jury that they could, indeed, just as well consider them as isolated events. Plainly, a trial judge is not required to balance every other sentence in a charge to the jury.

Viewed in the context of the entire charge in this case, these minor quibbles do not, in any sense, rise to the level of plain error; and plain error is the standard applicable, there having been no timely objections raised below. See *United States* v. *Pinto*, 503 F.2d 718, 723-24 (2d Cir. 1974); *United States* v. *Brawer*, 482 F.2d 117, 130 (2d Cir. 1973), *cert. denied*, 419 U.S. 1051 (1974); *Rule* 30 of the Federal Rules of Criminal Procedure.*

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* Reynolds did not address the subject of Count Fourteen at all when Judge Motley took exceptions to the charge. The court indicated that it would deem the objections made by counsel for Feiffer to be for all. (1732a). But Feiffer's counsel did not object to the Judge's failure to guide the jury with regard to the identifying characteristics of a "control" person. He objected only because she had advised the jury, incorrectly, in his view. (1730a-31a). Further, although counsel alluded to the fact that this portion of the charge stated the Government's contentions, it was in the context of his argument that the Judge was wrong on the law. (1731a-32a). He did not suggest that the charge was vague, or lacked detail, or that it failed to tell the jury that they did not have to view the transactions in Stern-Haskell as a whole. Neither did he assert, as both Chester and Reynolds appear to now contend, that the charge was unfair and omitted their theories.

POINT X

Inconsistent Verdicts Are Not a Basis for Reversal of Chester's Conviction.

Chester contends that his conviction should be reversed because his conviction on a substantive count (Count Fourteen) was inconsistent with his acquittal on the conspiracy count (Count One). (Chester's Brief at 16-19). This argument is entirely meritless.

Even assuming that the verdicts are inconsistent, it is settled law that an appellate court will not interfere with simultaneously rendered inconsistent verdicts. *Dunn* v. *United States*, 284 U.S. 390 (1932); *United States* v. *Zane*, *supra*; *United States* v. *Ortega-Alvarez*, 506 F.2d 455 (2d Cir. 1974), *cert. denied*, 421 U.S. 910 (1975).

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

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) ss.:
COUNTY OF NEW YORK)

JO ANN HARRIS being duly sworn, deposes and says that she is employed in the office of the United States Attorney for the Southern District of New York.

That on the 14th day of November 1975, she served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

Thomas A. Andrews, Esq.
Shea Gould Climenko Kramer & Casey
330 Madison Avenue
New York, New York 10017

David Keegan, Esq.
~~114 Old Country Road~~
~~Mineola, New York 11501~~ 1000 Franklin Avenue
JAH Garden City, New York

Mr. William Chester
955 N.E. 80th Street
Miami, Floriday 33138

And deponent further says that she sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

JoAnn Harris

Sworn to before me this
14th day of November, 1975

Gloria Calabrese

GLORIA CALABRESE
Notary Public, State of New York
No. 24-0535340
Qualified in Kings County
Commission Expires March 30, 1977